COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.
DIRECTOR
P.O.BOX 1105 **Richmond, VA 23218**

SUBJECT: Guidance Memorandum No. 10-2005
DEQ Policy for Areas and Activities Given the "Manipulated Wetland" Label by the Natural Resource Conservation Service

TO: Regional Directors, VWP Managers

FROM: Ellen Gilinsky

DATE: September 29, 2010

COPIES: Keith Lockwood, USACE; Chad Wentz, NRCS

Summary:
As part of their conservation planning and landowner assistance programs, the Natural Resource Conservation Service (NRCS) routinely cooperates with landowners who use wetlands for agricultural purposes. NRCS provides wetland determinations on agricultural lands and identifies wetland land uses by providing labels on the delineation map. NRCS uses the "manipulated wetland" label when wetlands are planned for alteration for agricultural purposes but the practice does not involve soil tillage followed by subsequent crop production. When NRCS provides a label of "manipulated wetland" and there are impacts to surface waters, Virginia Water Protection Permit (VWPP) Staff should strive to provide permitting recommendations consistent with the US Army Corps of Engineers (Corps) whenever possible. In some cases the two regulatory programs already make unified permit determinations. In other cases, differing regulatory authority does not allow identical permitting requirements. This guidance details the ten specific practices allowed in a "manipulated wetland" under the Food, Conservation, and Energy Act of 2008 (FSA) and discusses appropriate permitting considerations for each practice. The Corps and NRCS provided input to this guidance in the form of technical expertise regarding their respective regulatory authorities.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET and for the general public on DEQ's website at: http://www.deq.virginia.gov

Contact information:
Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dave.davis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Purpose

This guidance details the ten specific practices allowed in a "manipulated wetland" under the FSA and discusses VWPP permitting considerations for each. The Corps and NRCS provided technical expertise regarding their respective regulatory authorities to facilitate issuance of this guidance document.

II. Authority and Background

Authority of the Natural Resource Conservation Service

The Natural Resource Conservation Service (NRCS) implements the Food, Conservation, and Energy Act of 2008 (FSA), also known as the 2008 Farm Bill, by cooperating with landowners to facilitate conservation practices. NRCS identifies wetlands on program participants' land and labels the wetland delineation map to identify the current or planned land use and associated acreage for each wetland area.. Some wetland labels used by NRCS include, "wetlands" (W), "manipulated wetlands" (WX), and "artificial wetland" (AW).

If the "manipulated wetland" label is given, a manipulated wetland plan developed with NRCS assistance is required by the FSA that will document the following:

- Record that prior to granting a "manipulated wetland" label, the participant demonstrated that alternatives were considered to avoid manipulation of the wetland, but were not possible
- Documentation of alternatives reviewed/considered to avoid/minimize adverse wetland impacts
- Map or diagram of the planned practices in relation to the wetland
- Present condition of the wetland or conditions prior to manipulation if a manipulation has already taken place
- Planned alterations to the wetland or existing alterations considered manipulation
- Planned use of the "manipulated wetland"
- Scheduled start dated of manipulation or date manipulation took place
- Scheduled completion date of manipulation
- Planned cover for the area, including species, seedling rates, and planting instructions
- Boundary post markers
- Allowable maintenance
- Appropriate Federal, State, and local permits

If the manipulated wetland is allowed to re-vegetate based on the manipulated wetland plan, then the landowner remains in compliance with the FSA. If the site is not allowed to re-vegetate or the plan is not followed, and it becomes capable of crop production (e.g. stumps eventually rot) then it becomes a converted wetland making the landowner ineligible for NRCS monies. When the wetland is considered converted by the NRCS, it falls under VWPP and the Corps regulations.

Authority of VWPP Program

State Water Control Law (§62.1-44.15:20) and the VWPP Program Regulation (9 VAC 25-210-50 A) require an individual or general Virginia Water Protection Permit for any impact to a surface water, including wetlands. Specifically, a permit is required for the following activities:

> *1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.*

Normal agricultural and silvicultural activities such as: plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices, are excluded from the requirements of the VWPP Program Regulation. The exclusions apply to ongoing agricultural and silvicultural activities that follow agricultural or forestry best management practices. The provisions of the exclusion are defined in 9 VAC 25-210 60.

The construction or maintenance of farm ponds or impoundments, stock ponds or impoundments, or irrigation ditches, or the maintenance (but not construction) of drainage ditches is also excluded from the requirements under VWPP provided any related impounding structures are less than 25 feet in height or create a maximum impoundment capacity smaller than 100 acre-feet. See § 62.1-44.15:21 H, 9 VAC 25-210-60 10 a-d, and § 10.1-604 et seq.

Note that water withdrawals are subject to VWPP Regulations (9 VAC 25-210 et seq.) and the Water Withdrawal Reporting Regulation (9 VAC 25-200 et seq.). Also see Guidance Memo 08-2012 *Farm Pond or Impoundment and Stock Pond or Impoundment Exemption from Virginia Water Protection Program Requirements* for clarifications on the size and purpose of impoundments that are exempt.

Authority of the U.S. Army Corps of Engineers

The Norfolk District Regulatory Office of the U.S. Army Corps of Engineers (Corps) issues permits under the authority of Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 for regulated activities proposed throughout the state of Virginia.

Normal agricultural and silvicultural activities, such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices are specifically exempted from regulation under Section 404 CWA, provided best management practices at 33 CFR 323.4 (a) are followed. There are no silvicultural or agricultural exemptions for activities conducted in Section 10 (Navigable) waters.

Cooperation between NRCS, VWPP and the Corps

In 2006, DEQ, NRCS, the Corps and the U.S. Fish and Wildlife Service released the Interagency Local Operating Procedures for The Commonwealth of Virginia (8/15/2006) (Attached) to articulate the role of the Corps as lead for confirming delineations for activities not associated with agricultural production through involvement in a USDA – NRCS program. This document continues to serve as a reference for coordination and determining jurisdiction by the NRCS, Corps and DEQ over surface waters, including wetlands. Under the current interpretation of the FSA, the standard practice for the NRCS in Virginia is to obtain consent from the program participant prior to exchanging information with or reporting violations to the DEQ and the Corps.

III. Definitions

The definitions in 9 VAC 25-210-10 of the VWPP Program Regulation apply to this guidance document. Especially relevant definitions from the VWPP Program Regulation and from the Code of Virginia include the following.

Agricultural operation: means any operation devoted to the bona fide production of crops, or animals, or fowl including the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery, and floral products; and the production and harvest of products from silviculture activity. (§ 3.2-300)

Normal agricultural activities: those activities defined as an agricultural operation in § 3.2-300 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto. (9 VAC 25-210-10)

Normal silvicultural activities: any silvicultural activity as defined in § 10.1-1181.1 of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such silvicultural activity, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto. (9 VAC 25-210-10)

Production agriculture and silviculture: means the bona fide production or harvesting of agricultural or silvicultural products but shall not include the processing of agricultural or silvicultural products or the above ground application or storage of sewage sludge. (§ 3.2-300)

Definitions of agricultural production under the FSA do not include certain forms of agriculture that are considered production by the Commonwealth of Virginia. Terms used in this guidance that apply to FSA activities include the following.

Agricultural commodity: any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane (7 CFR 12.2)

Making production possible: allows or would allow production of an agricultural commodity where such production was not previously possible. On sites with woody vegetation, trees and stumps must be removed to constitute "making production possible" (7 CFR 12.2)

IV. Specific VWPP Exemptions under the Manipulated Wetlands Label

When NRCS provides a label of "manipulated wetland" and there are impacts to surface waters, Virginia Water Protection Permit (VWPP) Staff should endeavor to provide permitting recommendations consistent with the US Army Corps of Engineers (Corps) whenever possible. In cases when the activity is exempt from the VWPP Regulation, VWPP staff can issue a "No Permit Required" determination irrespective of the Corps' requirements. In some cases the Corps and DEQ can issue unified permitting requirements for a practice that is not otherwise exempt. In other cases, differing regulatory authority will not allow identical permitting requirements. For example, the Code of Virginia excludes construction of certain farm ponds and impoundments from permitting requirements. The Corps will likely require a permit under the CWQ for impoundments in streams that would interfere with flows and circulation of waters. Permit determinations can be provided by the respective regulatory agency after each agency reviews details of the practice, implementation plans, and the characteristics of the surface water being manipulated. In some cases, DEQ or the Corps will recommend submittal of the Joint Permit Application (JPA) for concurrent review by the DEQ, the Corps and the Virginia Marine Resources Commission (VMRC).

The ten practices that result in a "manipulated wetland" under the FSA are presented in bold below. Permitting considerations for the DEQ and the Corps are provided for each practice.

1. Trees are cut with stumps left in place and there is no manipulation of hydrology.
For DEQ, these activities meet the definition of normal agricultural activities and applicable requirements in the VWPP Regulation provided the practice is following a "manipulated wetland" plan approved by the NRCS. [See, 9 VAC 25-210-10 and 9 VAC 25-210-60]. Therefore, this practice would likely be excluded from the requirements of the VWPP regulation.

The Corps would not be likely to require a permit for this activity.

2. Construction of stock watering or irrigation ponds
For DEQ, the construction and maintenance of farm ponds and impoundments is excluded from the VWPP regulation provided the pond or impoundment does not fall under the authority of the Virginia Soil and Water Conservation Board pursuant to Article 2 (§10.1-604 et seq.) of Chapter 6 pursuant to normal agricultural or silvicultural activities. Size of the impoundment and impounding structure would determine if a pond or impoundment would meet the VWPP exclusion. (See GM 08-2012 *Farm Pond or Impoundment and Stock Pond or Impoundment Exemption from Virginia Water Protection Program Requirements* for clarification.)

Ponds would be exempt from regulation under Section 404 of the CWA only if they do not interfere with the reach, flow, or circulation of waters. Impoundments of streams would interfere with flows and circulation of waters, and therefore would not be exempt under 404 regulations. [See 33 CFR 323.4(c)).]

3. Trees are cut and placed in piles. **Stumps and soil remain intact (no grubbing), but the area cannot be cropped without additional land clearing activities. Stumps from non-wetland areas could be cleared & piled in wetlands.**

DEQ would require a VWP permit for placement of piles of stumps in a wetland, because it constitutes a fill in surface waters. [See 9 VAC 25-210-50.] However, if piling is only temporary and part of an established silvicultural operation within a wetland, the activity is not likely to require a VWP permit. [See, 9 VAC 25-210-60.]

The simple piling of cut trees may be considered fill under 404 of the CWA if the intent was to change wetland to upland. However, if piling is only temporary and part of a silvicultural operation within the wetland, the activity is not likely to be regulated by the Corps. When stumps from non-wetland areas are cleared and piled permanently in wetlands, the activity is likely regulated under Section 404 of the CWA.

4. Construction of roads, buildings, or other activities that do not make production possible.

Construction of roads may be exempt from regulation under Section 404 of the CWA and from the VWPP Regulation provided these roads are used only for agricultural, silvicultural activities, or moving mining equipment and are held to minimum necessary number, width, length and do not interfere with reach, flow, or circulation of waters. [See, 33 CFR 323.4(a)(6) and 9 VAC 25-210-60 11.]

Construction of buildings or other activities likely requires a VWP permit by DEQ, because they will likely involve excavation and fill activities in surface waters.

Construction of buildings and other activities are likely to be regulated by the Corps under Section 404 of the CWA if it results in a discharge of dredge or placement of fill material in waters of the US.

5. Spring development.

The placement of water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, or other wetland crop species, where these activities and the discharge occur in surface waters which are in established use for such agricultural and silvicultural wetland crop production are excluded from the VWP Regulation and would not require a permit. Placement of a structure in a spring head may require a VWP permit from DEQ. Water withdrawals from state waters, including springs, may need to be reported to the DEQ Water Supply Planning Program whether or not a VWP permit is needed. A permit will likely be required if no water withdrawal exclusions apply. [See, 9 VAC 25-210-60 B and 9 VAC 25-200.]

Most spring development projects entail installation of a pipe in the springhead. That is not considered a discharge of dredge or placement of fill under Section 404 of the CWA and is not regulated by the Corps. Those entailing only excavation in the springhead may also be exempt under 33 CFR 323.4(a)(6). Some do entail placement of fill such as placement of stone or concrete around the spring. These would typically fall under nationwide permit 18 or 40.

Regardless of federal policy under Section 404 of the CWA, state 401 water quality certification, or VWPP permit determination for development of the spring; water withdrawal is

regulated separately from the fill or discharge. A VWPP water withdrawal permit may be required unless an exclusion applies.

6. **An open ditch constructed through a forested wetland removes the hydrology, but the trees are not removed and the manipulation does not make production possible**.

Removing the hydrology from a wetland may require a VWP permit from DEQ depending on its extent and effect, as it might be considered a new activity to cause draining that significantly alters or degrades existing wetland acreage or functions. [See, §62.1-44.15:20].

The Corps would only regulate this activity if there was a discharge of dredge or placement of fill material in waters of the US; DEQ would also regulate this type of impact under the VWP program.

7. **Piles of trees, stumps and soil covering a wetland area, but the area cannot be cropped without additional land-clearing activities.**

DEQ would require a permit for the placement of fill material in a wetland. [See, 9 VAC 25-210-50.]

This activity is likely regulated under 404 of the CWA by the Corps.

8. **Conversion for orchards, groves, or vineyards.**

While not considered agricultural production by the NRCS, the Commonwealth of Virginia includes orchards, groves, and vineyards in its definitions of agriculture operation and production. Bringing a new area into agricultural production in surface waters is not excluded from the VWPP Regulation and requires a permit.

This activity is likely regulated under Section 404 of the CWA.

9. **Construction of agricultural waste management structures.**

Construction of such a facility in a wetland would likely require a Virginia Pollution Abatement (VPA) permit from DEQ. If the activity is not governed under the VPA regulation, a VWP permit would likely be required by DEQ. [See, 9 VAC 25-32-10 and 9 VAC 25-210.]

This activity is also likely regulated under Section 404 of the CWA.

10. **A non-perforated subsurface drain is constructed through a forested wetland that requires limited stump removal for installation and the manipulation does not make production of an agricultural commodity possible**.

Construction of a subsurface drain or stump removal would be regulated as draining and excavating in a wetland and would require a VWP permit from DEQ.

This activity may be regulated under 404 if stump removal and disposal results in a discharge of dredge or placement of fill in waters of the US**.**

Thorough review of the proposed project by DEQ-VWPP and the Corps should be conducted for any activity that brings a new area into agricultural production, as defined by the Commonwealth of Virginia. In general, permitting decisions can be expected to fall into one of three categories: 1) typically excluded from VWPP, 2) may be excluded from VWPP provided the activity is

temporary, and 3) likely requires a VWP permit. Table 1 presents each practice in its appropriate category.

Table 1. Typical VWP permitting outcomes for "manipulated wetland" practices.

"Manipulated wetland" practices that are **typically excluded** from the VWPP program include: **1. Trees are cut with stumps left in place and there is no manipulation of hydrology.** **2. Construction of stock watering or irrigation ponds.**
"Manipulated wetland" practices that **may be excluded** from VWPP provided the activity is temporary include: **3. Trees are cut and placed in piles. Stumps and soil remain intact (no grubbing), but the area cannot be cropped without additional land clearing activities. Stumps from non-wetland areas could be cleared & piled in wetlands.** **4. Construction of roads, buildings, or other activities that do not make production possible.** **5. Spring development.**
"Manipulated wetland" practices that likely **require a VWP permit** or similar permit required under State Water Control Law include: **6. An open ditch constructed through a forested wetland removes the hydrology, but the trees are not removed and the manipulation does not make production possible.** **7. Piles of trees, stumps and soil covering a wetland area, but the area cannot be cropped without additional land-clearing activities.** **8. Conversion for orchards, groves, or vineyards.** **9. Construction of agricultural waste management structures.** **10. A non-perforated subsurface drain is constructed through a forested wetland that requires limited stump removal for installation and the manipulation does not make production of an agricultural commodity possible**

V. Conclusions

When NRCS provides a label of "manipulated wetland" the activity should be reviewed by VWPP staff for possible permitting requirements under State Water Control Law and the VWPP Regulation. This is consistent with the FSA requirements of the "manipulated wetland" label. VWPP staff should first determine if a proposed "manipulated wetland" practice meets the requirements of the VWPP Regulation agricultural exclusions. (e.g. temporary agricultural road is excluded provided the discharge of fill is not in proximity to a public water supply and does not jeopardize the continued existence of state or federally listed threatened or endangered species.) Staff from the VWP Program should coordinate with the Corps and NRCS to provide unified permitting recommendations whenever possible.

Attachment

Interagency Local Operating Procedures for The Commonwealth of Virginia

Wetland Determination Memorandum of Agreement

Interagency Local Operating Procedures

For The Commonwealth of Virginia

Revised 8/15/2006

Table of Contents

Appendices

Wetland Determination Memorandum Of Agreement
Virginia Interagency Local Operating Procedures

INTRODUCTION:

Specific procedures are needed that indicate how determinations of wetlands and other waters of the U.S. will be completed in Virginia for purposes of *Section 404 Of The Clean Water Act (CWA), Subtitle B of The Food Security Act (FSA),* and *Title 62.1 of the Code of Virginia-State Water Control Law (SWCL)*. This document establishes specific procedures that have been agreed to by the participating MOA agencies: The U.S. Army Corps of Engineers (Corps), the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS), the U.S. Fish and Wildlife Service (USFWS) and the Virginia Department of Environmental Quality (DEQ).

I. AGENCY RESPONSIBILITIES

A. Lead agency for Jurisdictional Determination/Delineation

1. On all lands when work is associated with conversion of land (e.g. wooded lands) to agricultural production:

   NRCS for USDA Program Participants only
   Corps for non-USDA Program Participants.

   This includes modifications necessary to bring land into agriculture production (e.g. clearing, leveling, stumping);

2. Maintaining existing agricultural lands (e.g. crop and pasture lands) in agricultural production, including maintenance of ditches in those existing agricultural lands and perimeter ditches*.

   NRCS for USDA Program Participants
   Corps for non-USDA Program Participants

   * Note: Corps considers land to be abandoned for Section 404 CWA purposes if out of agricultural production for 5 years

3. On all lands when work is not associated with agricultural production.

   Corps

   This includes : a) Activities that are part of an agricultural operation (e.g. farmhouses, farm ponds, ditches located outside of crop or pasture lands, poultry houses, etc.) but don't make production possible; and
   b) Activities that are unrelated to agricultural production (construction of roads, houses, subdivisions, water supply reservoirs, buildings, mitigation banks, etc.)

4. Any Other Waters of the United States accompanying agricultural related activities but located outside of existing agricultural fields or pastures (rivers, streams, lakes, etc.)

   Corps

This is without regard to the nature of the activity and includes channelized streams, ditches, and canals that convey agricultural runoff.

B. Dual Lead

1. When there is a need for determinations by COE and NRCS agencies (e.g., a determination is needed for an agricultural activity involving both wetlands and Other Waters of the U.S. or non agricultural lands will be converted to agricultural production), the agencies will coordinate to provide both determinations in the same time frame.

II. INTERAGENCY COORDINATION/CONSULTATION

A. Use of Virginia Worksheet

1. Purpose
   To transfer information and facilitate coordination between the agencies in the Commonwealth of Virginia (See Appendix B). The worksheet will also be used for reporting violations.

2. Initiation
   Staff representing any of the signatory agencies can initiate use of the worksheet. The agency initiating coordination fills out the worksheet, providing the required basic information. The worksheet is then forwarded to the appropriate agency (i.e. Corps, NRCS, DEQ).

B. Jurisdictional Determinations/Delineations

1. Non-Agricultural Land Determinations

   Method: Determinations will be made using the U.S. Army Corps of Engineers 1987 Wetland Manual.

   a) For USDA Program Participants - NRCS makes certified wetland determinations for FSA purposes. These certified wetland determinations are not valid for CWA or SWCL purposes. The Corps must issue an approved wetland or water determination when there is CWA authority. The Corps will complete a determination within 45 days. During that period, the Corps will conduct any necessary site visits. The Corps will provide a copy of the approved jurisdictional determination to NRCS and DEQ. This determination will include information on any necessary permits, possible verification of nationwide or regional permits or agricultural exemptions.

   b) For non-USDA Program Participants - Determinations will be made by the Corps and do not require coordination with NRCS, although copies of determinations will be provided to DEQ.

   c) The Corps will determine if the wetland is subject to regulation under Section 404 CWA. If not, Corps will advise participant that authorization may be required from DEQ.

2. Agricultural Land Determinations

Method: Determinations will be made using the Virginia Mapping Conventions as part of the determination process.

a) For USDA Program Participants – These determinations will be made by NRCS and do not require coordination with the Corps.

b) For non-USDA Program Participants - These determinations will be made by the Corps and do not require coordination with NRCS although copies will be provided to DEQ.

3. Other Waters of the U.S. Determinations (rivers, streams, lakes, etc.)

a) Other waters of the U.S. are addressed in the Virginia Mapping Conventions and will be mapped only if these potential other waters will be manipulated. NRCS has no statutory authority to make "Other Waters of the U.S." determinations.

b) The Corps will determine whether an area is considered to be Other Waters of the U.S. and will advise property owners/operators of any permit requirements. A copy of that determination will be provided to DEQ. NRCS will receive a copy for USDA program participants.

c) Ditch maintenance within an existing farm field or pasture will not require an "Other Waters" determination provided the work does not result in a change in scope and effect (including change in cross-section width or depth).

d) Relocating of ditches within an existing farm field or pasture will require an "Other Waters" determination.

4. Delineations (identification of on-site boundaries)

a) Will be made under limited circumstances at the discretion of NRCS wetland team leaders or Corps staff for small areas (generally < 5 acres) when workload allows.

b) Otherwise, delineations will be conducted by consultants (a list of consultants can be found at http://www.nao.usace.army.mil/redesign/technical%20services/Regulatory%20branch/Agents/agents.aspand confirmed by the lead agency (NRCS or Corps).

C. Information Exchange

1. Information Exchange for Wetland Determinations

Courtesy copies of all jurisdictional determinations made by the Corps will be provided to DEQ. Courtesy copies of all jurisdictional determinations made by the Corps on portions of agricultural (or farming) operations (both agricultural and non-agricultural lands) will be provided to NRCS for USDA-program participants. These determinations will be made in a prompt and timely manner. In order to reduce potential differences between FSA and CWA, the Corps will make every reasonable effort to coordinate determinations and permit issuance and verification in the non-agricultural areas of farming operations with NRCS. The FSA does not have a minimum area in which wetland conversion for commodity crop production is acceptable, so the results of all determinations of any size must be provided to

NRCS.

2. In cases where an activity is proposed in wetlands or water determined by Corps not to be subject to regulation under Section 404 CWA, NRCS will coordinate with DEQ.
3. Information Exchange For Spring Development Projects. NRCS will maintain counts of spring development projects, along with the approximate area of wetland impact associated with each project. These totals will also be reported to signatory agencies on a quarterly basis by county. No further coordination with the Corps or DEQ will be required for these projects**.**
4. NRCS will share wetland determinations and wetland determination worksheets on areas that may be regulated by the CWA or SWCL.

D. Procedures for Reporting Potential Violations

1. Federal employees are required to report suspected violations of federal law, including the CWA and the FSA. Timely notification of suspected unauthorized activities would facilitate timely investigation and resolution. In general, if an alleged activity is more than 5 years old, the Corps does not consider it a high priority for further investigation. This limit does not apply to FSA or SWCL potential violations.
2. In order to investigate an unauthorized activity, the Corps, DEQ, or NRCS need to know the site location, what activities were/are being conducted, and if the work is ongoing. In addition, it is important to know whom is/was conducting the work, and when the work began. The wetland worksheet should be used to notify the Corps or DEQ of suspected CWA or SWCL violations. Corps or DEQ will notify NRCS wetland team leaders of suspected FSA violations.
3. During investigation of alleged unauthorized activities on farms, the signatory agencies will be afforded the opportunity to participate in site visits. Courtesy copies of all correspondence on alleged violations will be sent to the signatory agencies. All proposed resolutions of unauthorized activities will be coordinated with the signatory agencies to ensure that corrective actions are consistent with both CWA and FSA.

III. DURATION OF DETERMINATIONS

A. Corps determinations remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a Corps representative identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

B. An NRCS final certification shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.

IV. TRAINING

A. Cross-Manual Training for On-Site Wetland Calls

Inter-agency training on the Corps of Engineers' 1987 Manual for Identifying and Delineating Wetlands and on the wetland methodologies of the Food Security Act Manual (FSAM) is required before determinations or delineations are conducted on-site. Agency staffs who have not had this training are not authorized to identify or delineate wetlands on-site without the oversight of a trained agency staff person.

B. Joint Training

Interagency training shall be held periodically to familiarize staff with aspects of signatory agencies programs that relate to wetlands and other waters of the U.S. and to improve technical abilities related to those resources.

V TECHNICAL ASSISTANCE

At the request of the Corps or DEQ, NRCS may provide technical assistance for the identification of hydric soils. At the request of NRCS, the Corps may provide technical assistance in identification of wetland criteria, including hydrophytic vegetation and determination of "Other Waters of the U.S.".

IV. CONCURRENCE ON VIRGINIA INTERAGENCY LOCAL OPERATING PROCEDURES

The following representatives of the MOA signatory agencies concur on the Virginia Interagency Local Operating Procedures as outlined in this document.

_____ _____

M. DENISE DOETZER DATE
State Conservationist
United States Department of Agriculture
Natural Resources Conservation Service

_____ _____

KAREN L. MAYNE DATE
Supervisor
Virginia Field Office
Department of Interior
United States Fish and Wildlife Service

_____ _____

J. ROBERT HUME, III DATE
Chief, Regulatory Branch
Norfolk District
United States Army Corps of Engineers

_____ _____

CATHERINE M. HAROLD DATE
Manager, Office of Wetlands & Water Protection
Virginia Department of Environmental Quality

APPENDIX A LIST OF AGENCIES/CONTACTS

U. S. Army Corps of Engineers (COE):

General contact - Steve Martin
U.S. Army Corps of Engineers
803 Front Street
Norfolk, Virginia 23510
Phone: (757) 201-7787; FAX (757) 201-7678
steven.m.martin@usace.army.mil

Or specific COE field offices which can be found on the Norfolk District COE web page at: http://www.nao.usace.army.mil/redesign/technical%20services/Regulatory%20branch/varegions.htm

Natural Resources Conservation Service (NRCS):

Specific contacts (Wetland Team Leaders) - See attached map for counties covered:

Jeannine Freyman
Soil Resource Specialist
75 Hampton Boulevard
Christiansburg, Virginia 24073
Phone (540) 381-4221, Ext. 124; Fax (540) 381-4040
E-Mail -- jeannine.freyman@va.usda.gov

Louis Heidel
Soil Resource Specialist
1934 Deyerle Avenue, Suite A
Harrisonburg, Virginia 22801-3484
Phone (540) 434-1404, Ext. 123; Fax (540) 433-9998
E-Mail -- louis.heidel @va.usda.gov

Greg Hammer
Soil Resource Specialist
203 Wimbledon Lane
Smithfield, Virginia 23430
Phone (757) 357-7004, Ext. 126; Fax (757) 357-7798
E-Mail -- greg.hammer@va.usda.gov

John Nicholson
Soil Resource Specialist
100-D Dominion Drive
Farmville, Virginia 23901
Phone (804) 392-4171, Ext. 119; Fax (804) 392-1774
E-Mail -- John.Nicholson @va.usda.gov

For a map of territory responsibilities for each wetland team, refer to Conservation Compliance section of the Virginia NRCS website at http://www.va.nrcs.usda.gov/programs

General contact - Julie Hawkins, Biologist
1606 Santa Rosa Road, Suite 209
Richmond, Virginia 23229-5014
Phone (804) 287-1669; Fax (804) 287-1736
E-Mail – julie.hawkins@va.usda.gov

U.S. Fish and Wildlife Service (USFWS):

Bridgett Costanzo FSA Coordinator
Bridgett_Costanzo@fws.gov
6669 Short Lane
Gloucester, Virginia 23061
Phone: (804) 693-6694, Ext. 125; Fax (804) 693-9032

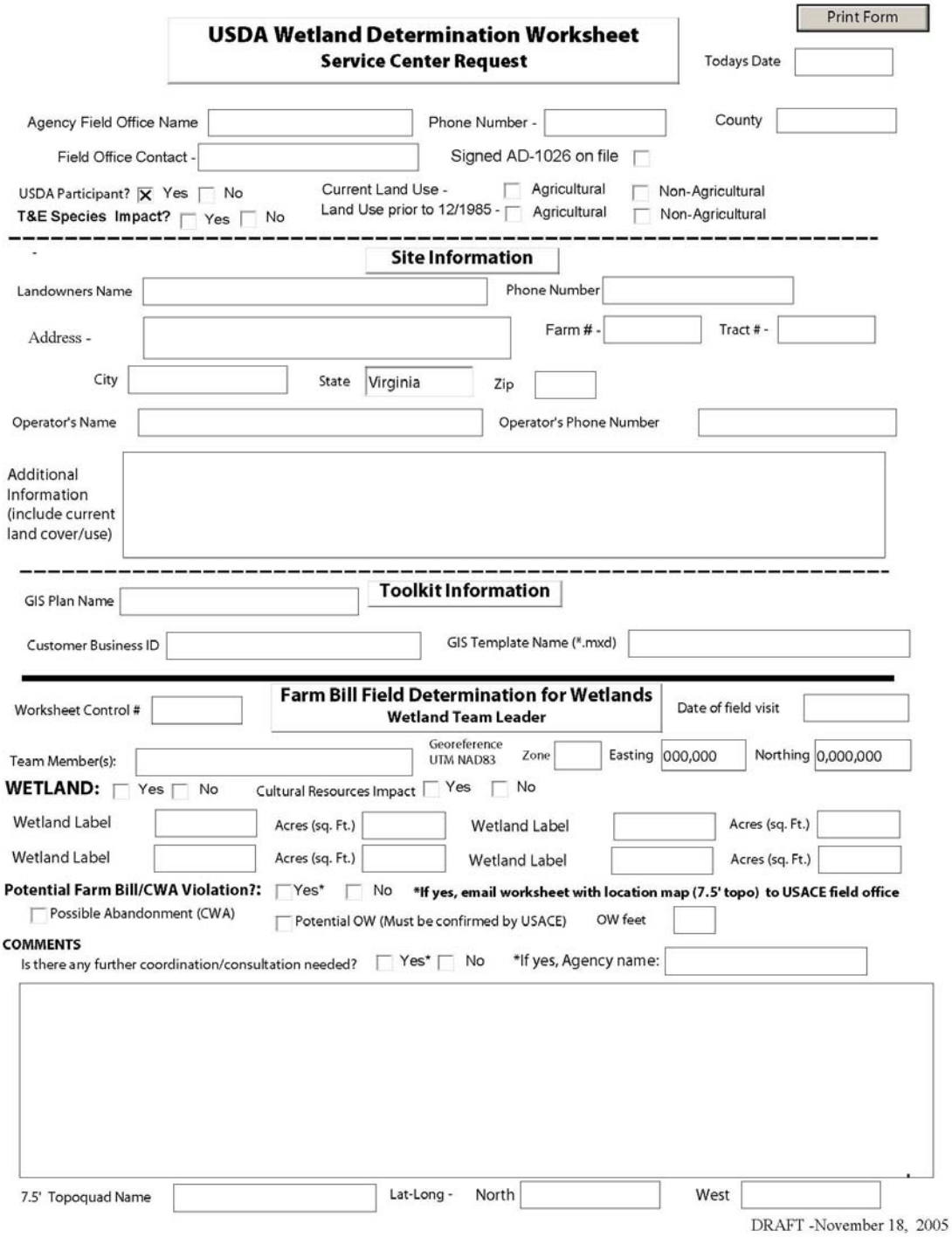
Virginia Department of Environmental Quality (DEQ):

General contact - David L. Davis
DEQ Office of Wetlands & Water Protection
629 East Main Street, 9th Floor
Richmond, Virginia 23219
Phone: (804) 698-4105 FAX (804) 698-4347
Email: dldavis@deq.virginia.gov

OR

Specific Regional Office contact information can be found at the DEQ website:
http://www.deq.virginia.gov/regions/homepage.html

APPENDIX B USDA WETLAND DETERMINATION WORKSHEET



Print Form

USDA Wetland Determination Worksheet
Service Center Request

Todays Date

Agency Field Office Name | Phone Number - | County

Field Office Contact - | Signed AD-1026 on file

USDA Participant? Yes No | Current Land Use - Agricultural Non-Agricultural
T&E Species Impact? Yes No | Land Use prior to 12/1985 - Agricultural Non-Agricultural

Site Information

Landowners Name | Phone Number

Address - | Farm # - | Tract # -

City | State Virginia | Zip

Operator's Name | Operator's Phone Number

Additional Information (include current land cover/use)

Toolkit Information

GIS Plan Name

Customer Business ID | GIS Template Name (*.mxd)

Farm Bill Field Determination for Wetlands
Wetland Team Leader

Worksheet Control # | Date of field visit

Team Member(s): | Georeference UTM NAD83 | Zone | Easting 000,000 | Northing 0,000,000

WETLAND: Yes No | Cultural Resources Impact Yes No

Wetland Label | Acres (sq. Ft.) | Wetland Label | Acres (sq. Ft.)
Wetland Label | Acres (sq. Ft.) | Wetland Label | Acres (sq. Ft.)

Potential Farm Bill/CWA Violation?: Yes* No ***If yes, email worksheet with location map (7.5' topo) to USACE field office**
Possible Abandonment (CWA) | Potential OW (Must be confirmed by USACE) | OW feet

COMMENTS
Is there any further coordination/consultation needed? Yes* No *If yes, Agency name:

7.5' Topoquad Name | Lat-Long - North | West

DRAFT -November 18, 2005

APPENDIX C NRCS WETLAND MAPPING CONVENTIONS

Revised - December, 2005

TABLE OF CONTENTS

Page

WETLAND MAPPING CONVENTIONS
AND
OFF-SITE PHASE WETLAND DETERMINATION PROCEDURES
FOR VIRGINIA

These conventions utilize National Food Security Act Manual (NFSAM) and U.S. Army Corps of Engineers (Corps) 1987 Manual wetland delineation procedures to make determinations on land owned or operated by a USDA program participant.

These mapping conventions do not identify other federally regulated waters of the United States, such as lakes, rivers, ponds and streams. These areas do, however, fall under federal and/or state regulatory authority. See Page 4 of the Mapping Conventions for an alternate procedure to make determinations in these areas.

These conventions are intended for use only in the off-site phase of the determination process. A field ("on-site") check will be made by the Wetland Team or the Corps before the wetland determination is considered complete.

Tools to be used to conduct a off-site phase of the wetland determination: county hydric soils list (FOTG), soil surveys, weather data for imagery dates, National Wetland Inventory (NWI), Farm Services Agency (FSA) aerial slides, USDA color infrared (CIR) photos, USDA digital orthophotography, other photos, personal knowledge, United States Geological Survey (USGS) topographic maps, FSA crop history.

Notes:
Hydric Soils include:

a. whole unit hydric soils
b. soils that are ponded and flooded
c. hydric soils included in non-hydric map units. (Hydric soil may occur in any soil map unit.)

Mapping Conventions for Agricultural Land:

NOTE: An on-site confirmation is required for all of the following determinations.

- Permanent pasture or hayland + hydric soils or wetland signature or NWI or USGS topographic map wet symbol or soil survey wet symbol on moderately well drained soil = **FWP**
  Note: Removal of any woody vegetation (stumping) from FWPs may constitute a wetland conversion
- Cropland1 + hydric soil (due to ponding for long or very long duration {15 consecutive days}) + wet signature (dark signature in a normal or dry year) + not abandoned = FW (Whole map unit hydric soil)[2]
- Cropland1 + wet signature (dark signature in a normal or dry year) + not abandoned = FW

[1] Cropland planted to an agricultural commodity in the period December 23, 1980 to December 23, 1985.
[2] Refer to "Determining Presence of Farmed Wetland (FW) on Cropland" on page 9 for ponding or flooding criteria.
NOTE: These soils may not exhibit typical matrix low chroma colors.

(hydric inclusion) [2]

- Cropland1 in Southeastern Virginia (including Chesapeake, Virginia Beach, Suffolk, Isle of Wight and Southampton Counties) + histosols (or soils with histic epipedons) + wet signature (ponds for 7 or more days or saturated for 14 or more days during growing season) + not abandoned = FW (Pocosin)
- Cropland1 + hydric soil (due to long or very long duration flooding) + 15 consecutive days flooding + wet signature + not abandoned = FW (whole map unit hydric soil) [2]

- Cropland1 + hydric soil (sandy soil or poorly drained) + not an FW+ not abandoned (CWA purposes only) = PC (Coastal Plain only)[1]
- Cropland1 + hydric soil + not and FW = PC[3]
- Cropland1 + wet signature (due to saturation) = PC[3]
- Any cropland, permanent pasture or hayland + no hydric soil +no wet signature + no NWI = Non Wetland (NW)
- Any Farmed Wetland (FW) converted to increase agricultural production after November 28, 1990 = CW + yr. (An on-site confirmation is required to ascertain a CW + yr.)
- Pond on non-hydric soil or PC that was not abandoned prior to pond construction = AW
- Pond on wetland = W

[1] If abandoned for five consecutive years and hydrology and woody vegetation potentially have returned, contact the Corps.

VIRGINIA PROCEDURE FOR MAKING FOOD SECURITY ACT
"OTHER WATERS[1]" DETERMINATIONS

This procedure is designed to provide a method to identify and label potential "Other Waters" (OW) and notify clients of potential permit implications.

Procedure:

1. Where manipulation that potentially involves "Other Waters" is planned:

    - If a manipulation that potentially involves "Other Waters" (OW) is planned (with or without associated wetland impacts), use the "Wetland Determination Worksheet" to notify the Corps.

    - The Corps will make the OW determination, locate and identify the area on a map and forward this information to the appropriate requesting NRCS field offices within 45 days[2].

    - NRCS will locate and label manipulated OW areas and notify the Farm Service Agency on the NRCS-CPA-026E form as part of the Food Security Act wetland determination.

2. Where no manipulation that potentially involves "Other Waters" is planned:

    - NRCS will label the non-wetland "Other Waters" areas as NI (not inventoried)

[1] Waters of the US, Other Than Wetlands
[2] The Corps will be responsible to determine whether an area is considered to be "Other Waters" and to advise property owners/operators of any permit requirements

DEFINITIONS

1. **Agricultural Commodity**

   Any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters. Examples include corn, soybeans, sorghum, barley, tomatoes, melons, etc.

2. **Agricultural Land**

   Lands intensively used and managed for production of food or fiber. Examples are cropland, hayland and pastures, including native pastures and rangeland, orchards, vineyards, other lands used to produce or support the production of livestock and small tree farms.

3. **Agricultural Use**

   Check definitions for further discussion of urban. Land devoted to the use and management of land for production of food, fiber, or horticultural crops.

4. **Artificial Wetland (AW)**

   Formerly non-wetland under natural conditions, but now exhibits wetland characteristics due to human activities: includes impoundments and dugout ponds built on either non-wetland (NW) or prior converted cropland (PC).

5. **Cropland**

   Refers to agricultural land planted to an agricultural commodity (annually planted crop) at least once every five years or in a formal state or federal set-aside program. Also includes pasture or hayland in commonly used rotation with an agricultural commodity.
   Examples of agricultural commodities include corn, soybeans, sorghum, barley, tomatoes, melons, etc.

6. **Converted Wetland (CW and CW + year)**

   Wetland manipulated after December 23, 1985, to the extent that production of an agricultural commodity is possible, even if such crop is not actually planted.
   Manipulation includes removal of woody vegetation (cleared and stumped) and/or modification of wetland hydrology by draining, filling, leveling, etc., or any activity that results in impairing or reducing the flow, circulation, or reach of water.
   CW is converted prior to November 28, 1990 and CW + year are converted on or after November 28, 1990.

7. **Farmed Wetland (FW)**

   FW meets the following:
   -- Manipulated and used to produce an agricultural commodity at least once prior to December 23, 1985 but had not been converted prior to that date.
   -- Area still meets wetland hydrology criteria and either seasonally floods or ponds for extended periods of time (at least 15 consecutive days during the growing season).
   -- Area not abandoned.

8. **Farmed Wetland Pasture or Hayland (FWP)**

FWP meets the following:
-- Manipulated and managed for pasture or hayland prior to December 23, 1985, but still meets wetland hydrology criteria
-- Area not abandoned.
-- Permanent pasture or hayland.

9. **Growing Season**[1]

The growing season is defined as that part of the year when soil temperatures at 19.7 inches below the soil surface are higher than biologic zero (5 degrees C).

In Virginia it can be approximated as the period of time between:

The average date of the last killing frost (28^{o}F) in the spring

AND

the average date of the first killing frost (28^{o}F) in the fall.

10. **Non-Agricultural Land**

Lands where natural vegetation has not been removed or has returned even though grazed, mowed, or collected as forage or fodder. Includes forestland, wood lots, tree farms and uncultivated meadows, and pastures.

11. **Other Waters of the U.S.**

Other waters of the U.S. refer to all waters other than wetlands. Work in "other waters of the US" (including placement of fill, excavation, grading, and placing structures) may require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

Waste treatment systems, including treatment ponds or lagoons are generally not waters of the US and work in these systems may not require authorization from the Corps; however, if abandoned these may become waters of the U.S.

The complete regulatory definition of waters of the US is listed in the Corps regulations at 33 CFR 328.3. The jurisdictional limits of waters of the US are defined at 33 CFR 328.4.

12. **Prior Converted Cropland (PC)**

Wetlands that before December 23, 1985, were drained, dredged, filled, leveled, or otherwise manipulated including the removal of woody vegetation for the purpose of, or to have the effect, of making the production of an agricultural commodity possible and an agricultural commodity and an agricultural commodity has been produced at least once before December 23, 1985.

13. **Small Tree Farm**

Where trees are treated as nursery stock, i.e., removal from the ground for landscaping or Christmas trees nurseries.

14. **USDA Program Participant**

---

[1] Refer to National Food Security Act Manual, Fifth Edition, part 514.05c.
Note that the U.S. Fish and Wildlife Service do not utilize this definition for the purposes of wetland determination under the National Wetlands Inventory (NWI).

Any producer enrolled in or applying for a current USDA program

Waters of the US

Include wetlands, lakes, streams (perennial and intermittent), ponds (created through excavation or impoundment), rivers, territorial seas, all tidal waters (including tidal drainage ditches), mudflats, sand flats, sloughs, prairie potholes, wet meadows, playa lakes, pocosins, abandoned borrow pits, etc.

15. **Wetlands that have been manipulated (WX)**

A wetland that:
-- was manipulated after December 23, 1985
-- was not for the purpose of and did not make production of agricultural commodities possible
-- is undergoing an action leading toward wetland conversion.

Examples
Clear cutting wooded wetland (without stump removal).
Drainage ditch through or adjoining a wooded wetland

DETERMINING ABANDONMENT[1]

Cropland (Applies to FW)

Use 1985 or 1986 imagery; and current year slide or digital orthophotography plus photography taken 5 years prior and FSA cropping history for same years.

NOTE: Bracket the most current 5-year period with photography.

Requires on-site evaluation to determine if wetland criteria have returned (abandonment). If criteria have returned, area is **W**.

-- Area is **W** if land has been idle for preceding 5 years; otherwise remains **FW**.

NOTE: Set-aside, CRP, or other conservation use programs do not constitute abandonment. Land in these programs is considered being actively cropped.

Pasture or Hayland (Applies to FWP)

Requires on-site evaluation

Suggested items to evaluate for abandonment:
(Presence of the following indicates active management, i.e., not abandoned)
-- Fence maintenance
-- Livestock movement (trails, etc.)
-- Use of water facilities and streams
-- Presence of livestock
-- Presence of young woody vegetation
-- Evidence of grazing/clipping
-- Presence of hay bales

[1] FW and FWP are not subject to abandonment for Farm Bill purposes only if the person provides hydrologic and vegetative baseline conditions prior to allowing the site to revert to wetland (W)

DETERMINING PRESENCE OF FARMED WETLAND (FW) ON CROPLAND

FW only applies where ponding or flooding occurs for 15 or more days in the growing season.

NOTE: Exceptions to these are former Pocosin wetlands in Southeastern Virginia. See page 2 of Mapping Conventions.

Generally at least 5 years of photographic imagery in a 10-year period is needed to make FW determinations. In some cases, 3 years of photographic imagery taken in normal rainfall conditions may be adequate. If all three years either clearly show a wet signature OR clearly do not show a wet signature for a given site, then the determination can be made without the use of additional imagery.

If the imagery from 3 normal years is inconclusive, then additional imagery will be required for the determination. For example, one of the 3 may show a signature, but the other 2 do not. In this situation, imagery must include either 2 additional normal years OR equally weighted between dry and wet years. Therefore, if > 3 years of imagery is needed to reach a conclusion, and no more normal years are available, then imagery from one dry and one wet year will be needed to reach a final FW determination.

If at least three years out of either three or five years of imagery as discussed above indicate one or more of the following, then 15 consecutive days of ponding or flooding is assumed.

-- Drowned crop.
-- Lush growth (darker green, etc.) in a dry period.
-- Light green or yellow in a normal period.
-- Late planting date or avoidance.
-- Absence of crops.
-- Ponded water.

NOTE: Sites not meeting above criteria are labeled PC.

Determination Summary:

- If all 3 years of normal imagery are positive = Positive FW Determination
- If all 3 years of normal imagery are negative = Negative FW Determination
- If 3 years of normal imagery give mixed positive and negative results---> Use 5 years of imagery
- For min. 5 years of imagery, use combinations of normal (N) and equal number of dry (D) and wet (W) years. Examples: NNNWD, NNNNN, NNNNDW (Must have equal no. W & D years).

APPENDIX D AG EXEMPTIONS

COE regulations (33 CFR 323.4) explained
http://www.usace.army.mil/inet/functions/cw/cecwo/reg/33cfr323.htm

DEQ regulations explained http://www.deq.virginia.gov/wetlands/wetlands.html

APPENDIX E ENFORCEMENT ACTIVITIES

1. Corps/EPA/DEQ Enforcement (See 33 CFR 326)

Activities in wetlands and Other Waters of the United States that may require Corps or DEQ authorization include placement of fill, excavation, mechanized land clearing, stumping, grading, and placement of some structures. Enforcement involves the investigation and resolution of potentially unauthorized activities by the Corps, EPA and/or DEQ.

If the activity appears to be in violation of CWA, the Corps may order the participant to halt all work in wetlands and Other Waters of the U.S. (a Cease and Desist Order). Failure to comply with the cease and desist order can result in civil and/or criminal penalties. The Corps may also refer the case to EPA for further administrative, civil, or criminal actions.

Generally, the Corps, DEQ and EPA prefer to see the participant take voluntary measures to correct a violation; however, either the Corps, DEQ or EPA can direct the participant to take corrective actions. Occasionally, the participant will not cooperate with the Corps, at that point, the Corps may refer the case to EPA or choose to take legal action (civil or criminal). EPA can assess administrative penalties of up to $125,000 for unauthorized activities.

In the event that a participant will not cooperate with DEQ to voluntarily correct a violation, the participant may be subject to injunctive relief requiring compliance with wetland law and regulations as well as civil penalties of up to $32,500 per day of each violation of the same. In addition, Va. Code § 62.1-44.15 authorizes the State Water Control Board to issue orders to any person to comply with the State Water Control Law and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the State Water Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 62.1-44.32 (b) and 62.1-44.32 (c) provide for other additional penalties.

2. NRCS Enforcement

The FSA prohibits those farmers that are currently receiving USDA program benefits from making commodity crop production possible in wetlands. In a forested wetland, for example, commodity crop production would be possible once the trees and stumps were removed.

If a FSA swampbuster violation is found by NRCS, it will request a Form FSA-569 from the USDA Farm Service Agency (FSA). NRCS will also determine if a violation of FSA has occurred if reported on a Form FSA-569 by FSA. Processing this form may result in suspension of the participant's USDA benefits. Benefits may be restored pending restoration or mitigation of the impacted wetland area on a converted wetland plus year (CW + year), or after cessation of cropping on a converted wetland (CW).

Whistleblower complaints may be received either verbally or in writing, and may come from any source. All complainants are to remain anonymous, unless the complainant indicates otherwise. The name of the whistleblower shall not be maintained in the case file but should be maintained in a separate "Report of Possible Noncompliance" register. Whistleblower complaints referred to NRCS on form FSA-569 should be completed within 30 days in a field office and/or within 45 days in an area or state office.

APPENDIX F CORPS-USFWS MOA – PARTNERS FOR WILDLIFE WETLAND RESTORATION SITES EXEMPT FOR USE IN MITIGATION

COPY

Bruce

Local Operating Procedures between the Virginia Field Office, U.S. Fish and Wildlife Service and the Norfolk District, Corps of Engineers

Regarding Limitations on the Use of Voluntary Habitat Restoration Projects in Virginia for Mitigation Credits

Landowners can enter into an agreement with the U.S. Fish and Wildlife Service (Service) under their Partners for Fish and Wildlife Program (PFW) to receive cost share and technical support to voluntarily restore wetlands and streams. Partners for Fish and Wildlife, and other voluntary restoration programs, were established by Congress to be a source of net gain in aquatic resources. During the duration of the PFW landowner agreement, generally 10-25 years, the site cannot be used for mitigation credit. However, the terms of the PFW agreement allow the landowner to terminate the agreement if he/she reimburses the Service for their cost of the project.

According to the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks published in the Federal Register on November 28, 1995 by the Corps of Engineers (Corps), Environmental Protection Agency, the Natural Resources Conservation Service, U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, wetlands restored Through the PFW program or similar programs cannot used to generate credits from a mitigation bank (See Paragraph II. Policy, Considerations, B. Planning Considerations, 2. Site Selection). No such guidance document exists for stream mitigation issues.

The Corps and the Service are concerned that landowners may use the PFW program to have wetlands/streams restored, terminate the PFW agreement, and then use these acres toward mitigation for impacts authorized through the regulatory program. Such a practice would negate the benefits of the PFW program, and use Federal tax dollars to supplement restoration of wetlands/streams for use as mitigation for private development projects. It is the joint position of the Corps and the Service that PFW restored habitats not be allowed to be used as restoration credit as part of a site-specific mitigation plan or mitigation bank. Such wetlands/ streams may be considered as preservation credit, as mutually agreed upon by the Corps of Engineers and the Service. In all cases, the use of PFW restored wetlands as preservation would require that the preservation credit not be used to reduce the compensatory wetland restoration to less than a one to one ratio.

Karen L. Mayne
Project Leader
Virginia Field Office
U.S. Fish and Wildlife Service

2/14/2005
Date

J. Robert Hume, III
Chief, Regulatory Branch
Norfolk District
Corps of Engineers

8 Feb 05
Date

U.S. ARMY CORPS OF ENGINEERS
RECEIVED
FEB 16 2005

APPENDIX G COE JOINT PUBLIC NOTICE – RESTORATION AGREEMENT SITES NOT SUITABLE FOR MITIGATION

Joint Public Notice

U.S. Army Corps of Engineers, Norfolk District
Virginia Department of Environmental Quality

June 21, 2005

Existing Federal Programs to Restore Wetlands and How Such Areas Will Be Considered in the Review of Permit Applications

Landowners can enter into an agreement with the Natural Resources Conservation Service (NRCS) under the Conservation Reserve Program or the U.S. Fish and Wildlife Service (FWS) to receive cost share and technical support to voluntarily restore wetlands and streams. Such programs were established by Congress to be a source of net gain in aquatic resources. During the duration of the program landowner agreement (generally 5-33 years for NRCS programs and 10-25 years for FWS programs), the site cannot be used for mitigation credit. However, the terms of the program agreement allow the landowner to terminate the agreement if he/she reimburses the respective Service for their cost of the project.

According to the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks published in the Federal Register on November 28, 1995 by the Corps of Engineers (Corps), Environmental Protection Agency, the Natural Resources Conservation Service, U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, wetlands restored through the Conservation Reserve Program or similar programs cannot be used to generate credits from a mitigation bank (See Paragraph II. Policy, Considerations, B. Planning Considerations, 2. Site Selection).

In accordance with the Federal Mitigation Banking Guidance, Federally-funded wetland mitigation projects such as described above cannot be used to generate credits within a mitigation bank. In addition, we will not allow such restored habitats to be used as restoration credit as part of a site-specific mitigation plan. However, we may consider such wetlands for preservation credit. In all cases, the use of such restored wetlands as preservation credit will be at a minimum of a 10:1 ratio and cannot be used to reduce the restoration or creation component of the compensatory mitigation to less than a 1:1 ratio.

J. Robert Hume, III
Chief, Regulatory Branch
Norfolk District, Corps of Engineers

Catherine M. Harold, PWS
Manager, Office of Wetlands and Water Protection
Virginia Department of Environmental Quality

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.
DIRECTOR

P.O. Box 1105 Richmond, VA 23218

Subject: Guidance Memorandum No. 10-2002
Virginia Water Protection Permit Program Noncompliance Determination and Enforcement Referral Guidance

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: January 22, 2010

Copies: Deputy Regional Directors, Regional VWPP Program Managers, Regional Water Permit Managers, James Golden, Rick Weeks, Central Office VWPP Program Staff

Summary:
This guidance document provides direction for evaluating noncompliance with Virginia Water Protection Permit (VWPP) Program regulations and provides a point system for determining the appropriate compliance response, including when to refer cases to the Division of Enforcement. The point system allows VWPP Program staff (Staff) to consistently assess and respond to alleged noncompliance. This guidance replaces the VWPP portion of the DEQ Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual (dated May 23, 2002, amended March 25, 2008) and the 1999 Enforcement Manual, which refers to DEQ Guidance Memorandum No. 02-2010 for the VWPP Program.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for Staff internally on DEQNET, and for the public on the Department of Environmental Quality's (DEQ) website at: http://www.deq.virginia.gov.

Contact information:
Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. PURPOSE

This guidance establishes procedures for addressing alleged permit noncompliance and unpermitted activities for the Virginia Water Protection Permit (VWPP) Program. It establishes methods and tools for quantifying noncompliance and unpermitted activities in order to determine the appropriate compliance response and for referring cases to the Division of Enforcement. The guidance revises the Point Assessment Criteria and makes it the required procedure for assessing noncompliance in the VWPP Program.

II. BACKGROUND AND AUTHORITY

The Water Compliance Auditing Manual 02-2010 (dated May 23, 2002, amended March 25, 2008) includes procedures for addressing alleged noncompliance for DEQ Water Division programs, including the VWPP Program. The manual provides the Water Division with procedures to promote Regional Office consistency when processing compliance information. Since statutory changes in 2000 expanded the VWPP Program, the guidelines presented in Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual (dated May 23, 2002, amended March 25, 2008), do not reflect current program needs. This guidance replaces Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual procedures for the VWPP Program. In addition, Staff should refer to this guidance when other DEQ documents, such as enforcement guidance or manuals, reference Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual, when addressing VWPP Program compliance.

The DEQ's authority to conduct compliance investigations and inspections is provided for in the State Water Control Law (Va. Code 62.1-44.2 thru 62.1-44.34:28), VWPP Program Regulation (9 VAC 25-210-10 *et seq.*), and permit conditions.

- Code of Virginia (§ 62.1-44.15(6)) states: "To make investigations and inspections, to ensure compliance with any certificates, standards, policies, rules, regulations, rulings and special orders which it may adopt, issue or establish and to furnish advice, recommendations, or instructions for the purpose of obtaining such compliance."

- Code of Virginia (§ 62.1-44.20) states: "Any duly authorized agent of the Board may, at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this chapter."

- 9VAC 25-210-90.D Inspection and Entry of the VWPP Program Regulation states: "Upon presentation of credentials, the permittee shall allow the board or any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to conduct the actions listed in this section. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

  1. Enter upon any permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;

2. Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; and

3. Sample or monitor any substance, parameter or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law."

- The Code of Virginia (§ 10.1-1186) authorizing enforcement activities, states: "Notwithstanding any other provision of law and to the extent consistent with federal requirements, following a proceeding as provided in § 2.2-4019, issue special orders to any person to comply with: (i) the provisions of any law administered by the Boards, the Director or the Department, (ii) any condition of a permit or a certification, (iii) any regulations of the Boards, or (iv) any case decision, as defined in § 2.2-4001, of the Boards or Director."

- The VWPP Program Regulation (9 VAC 25-210-240) identifies DEQ enforcement staff as the lead for unpermitted surface water impacts: "The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and § 10.1-1186 of the Code of Virginia."

III. DEFINITIONS

The definitions in 9 VAC 25-210-10 of the VWPP Program Regulation and VA Code § 2.2-4001 apply to this guidance. The following definitions are especially pertinent to this guidance:

Administrative Requirements: Requirements within permit conditions that involve providing notifications, reports, submittals, or other documents to DEQ, primarily for self-reporting compliance activities.

Alleged Noncompliance: Suspected failure to abide by requirements of permit conditions, regulations, or laws.

Enforcement Action: Means any action taken by the Division of Enforcement, including but not limited to a Consent Special Order, a Special Order issued after a formal or informal hearing, a Letter of Agreement, or a referral to the Office of the Attorney General. The term Enforcement Action does not include dereferral of a case.

Onsite Requirements: Permit conditions that involve requirements related to onsite construction or other activities in and around State waters. Onsite requirements are permit conditions not related to administrative requirements or other notifications, reports, or other documents required by DEQ. For example, these requirements would include culverts installed to maintain low flow conditions, stabilization of exposed slopes and streambanks immediately upon completion of work in each permitted impact area, flagging or demarcation of nonimpacted surface waters within 50 feet of permitted activities, adherence to time-of-year restrictions, etc.

Major Exceedance: Permitted project where unauthorized activity typically exceeds the minor modification/notice of planned change thresholds (For specific thresholds, *see* 9 VAC 25-210-180, 9 VAC 25-660-80, 9 VAC 25-670-80, 9 VAC 25-680-80, VAC 25-690-80). For surface

water withdrawals only (e.g. does not include fill and/or excavation in surface waters), a major exceedance is typically considered a major surface water withdrawal, which is an unauthorized withdrawal of 90 million gallons per month or greater that does not otherwise qualify for a permit exclusion (*see* 9 VAC 25-210-10 and 9 VAC 25-210-60.B). Major exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

Major Unpermitted Impacts: Applies to projects where no permit was obtained in advance of unpermitted impacts requiring compensatory mitigation, (e.g. typically unpermitted impacts exceeding 0.10 acre of wetland or open water, or 300 linear feet of streambed impact). For surface water withdrawals, a major unpermitted impact applies to a withdrawal that is greater than or equal to 90 million gallons per month. Major unpermitted impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

Minor Exceedance: Permitted project where unauthorized activity is typically less than or equal to minor modification/notice of planned change thresholds (For specific thresholds, *see* 9 VAC 25-210-180, 9 VAC 25-660-80, 9 VAC 25-670-80, 9 VAC 25-680-80, VAC 25-690-80). For surface water withdrawals only (e.g. does not include fill and/or excavation in surface waters), a minor exceedance is typically considered a minor surface water withdrawal, which is an unauthorized withdrawal of less than 90 million gallons per month that does not otherwise qualify for a permit exclusion (*see* 9 VAC 25-210-10 and 9 VAC 25-210-60.B). Minor exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

Minor Unpermitted Impacts: Applies to projects where no permit was obtained in advance of unpermitted impacts that do not require compensatory mitigation, when permitted, (e.g. typically unpermitted impacts less than 0.10 acre of wetland or open water, or 300 linear feet of streambed impact and no special resources, such as threatened and endangered species, exist within the project area). For surface water withdrawals, a minor unpermitted impact applies to a withdrawal that is less than 90 million gallons per month. Minor unpermitted impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

Points: Values assigned to alleged violations based on potential for harm to the environment and/or to the regulatory program. The VWPP Program determines the appropriate method to address alleged noncompliance based on the number of points accumulated.

Unpermitted Activity: Activities occurring without a required permit, such as filling, excavating, dredging, mechanized land clearing, ditching, or activities otherwise affecting the physical, chemical, or biological properties of wetlands, streams, or other State waters.

IV. REVIEWING COMPLIANCE

The primary goal of the VWPP compliance program is timely, appropriate, and consistent application of the VWPP Program Regulation (9 VAC 25-210-10 *et seq*). Staff must work with the regulated community to achieve and maintain compliance with state laws and regulations. Priorities include violation prevention, timely resolution of serious violations, and early identification, correction, and resolution of minor violations. While compliance is the primary goal, Staff must refer activities for enforcement review as appropriate based on severity, history, or other relevant factors. In accordance with Division of Enforcement Guidance Memorandum No. 1-2005 (Revision 1) – Notices of Alleged Violation (NOAVs): Formats and Processes for Warning Letters and Notices of Violation (dated September 25, 2008), Staff addresses noncompliance using informal corrective action, a warning letter (WL), or a notice of violation (NOV). The following guidance addresses methods and procedures to determine the most appropriate approach based on the level of noncompliance.

Comprehensive Compliance Review

Staff should assess compliance continually over the term of a permitted project through frequent follow-up, site inspection, and document review. Using this approach, Staff can discern noncompliance relatively early and responsible parties can bring projects back into compliance before the potential for environmental harm increases. Staff may also review some permits less frequently or in a one-time comprehensive compliance review of the permit file and permitted activity. Permits reviewed less frequently are those that pose the least risk of noncompliance and environmental harm. A comprehensive compliance review includes the following: 1) conducting site inspections and documenting any onsite alleged noncompliance; 2) confirming receipt of all required submittals and approving their content; and 3) reviewing project compliance history.

V. ASSESSING POINTS FOR PERMIT NONCOMPLIANCE AND UNPERMITTED ACTIVITIES

Alleged permit noncompliance or unpermitted activities are evaluated using the Point Assessment Criteria (Appendix A), and associated guidance. The Point Assessment Criteria provides a mechanism for determining the level of response to noncompliance: informal corrective action, WL, or a referral to the Division of Enforcement using a NOV. The Point Assessment Criteria is structured such that more serious instances of noncompliance receive more points. The Points assessed are dependant upon factors such as the severity of environmental harm, the effect on the VWPP Program, and the compliance history.

Staff must use the following procedure when assessing alleged permit noncompliance and unpermitted activities:

1. Staff first identifies alleged permit noncompliance or unpermitted activity through site inspections, file review, and/or other appropriate means. Staff must document alleged permit noncompliance or unpermitted activity using field notes, photographs, inspection forms, file review notes, inspection reports, and/or other methods to provide supporting information for future compliance or enforcement actions. This information constitutes part of the case file

and is used to support any resulting compliance or enforcement actions.

2. Staff then uses the Point Assessment Criteria to characterize all noncompliance identified during a comprehensive compliance review and/or inspection and to group violations into standardized categories (infractions). Once categorized, each individual violation of enforceable documents, State laws, regulations, and permit conditions receives Points or fractions of Points, separately. Staff can also assign additional Points for aggravating factors, in consultation with the Division of Enforcement, if the situation merits (*see* Table 4 of Appendix A for aggravating factors).

3. Staff compiles a comprehensive list of all infractions and resulting Points in order to provide a useful reference for future enforcement cases. Points accrue over the entire permit term. When available, Staff uses the Comprehensive Environmental Data System (CEDS) to track alleged noncompliance and Points.

4. After compiling a comprehensive list of Points, Staff calculates:
   i) Total onsite Points;
   ii) Total administrative Points less than or equal to 12 months old (*see* Part VI.B); and
   iii) Total aggravating factor Points.

   Appendix B provides a worksheet to clarify the calculation method. For the purpose of the Point Assessment Criteria, the age of an administrative noncompliance Point is determined using the date the noncompliance occurred, not the date which Staff discovered the noncompliance.

5. Staff uses the sum of all Points calculated to determine the appropriate compliance response.
   - Projects accumulating 1.0 Point or less are addressed through informal corrective action;
   - Projects accumulating 1.1 Point or greater, but no more than 3.9 Points, receive a WL;
   - Projects accumulating 4.0 Points or more receive a NOV and are referred to the Division of Enforcement.

After utilizing Steps 1 through 5 above to calculate the total Points and to determine the appropriate compliance response, Staff review the result of the Point Assessment Criteria with their managers. Situations may arise when a case exceeds the 4.0 Point threshold, but the facts of the case do not merit immediate referral to the Division of Enforcement. However, Staff should always refer unpermitted activities that exceed the 4.0 Point threshold to the Division of Enforcement. Staff can refrain from referring cases to the Division of Enforcement under the following conditions:

- The responsible party has a permit (the activity is not unpermitted);
- No environmental harm resulted from the noncompliance (i.e. no impacts or fill to State waters);

- The responsible party is cooperative and can easily correct the noncompliance. For instance, a delinquent monitoring report is promptly submitted which has the effect of reducing the Point Assessment Criteria calculation below the 4.0 Point threshold;
- The responsible party has corrected previous infractions to the VWPP Program's satisfaction and removing the associated Points reduces the Point Assessment Criteria calculation below the 4.0 Point threshold. Generally, noncompliance corrected more than 6 months ago are not included in Point Assessment Criteria calculations. However, permittees showing a pattern of frequent noncompliance, even when they have corrected previous violations, should still be considered for referral to the Division of Enforcement.

If Staff does not refer a case to the Division of Enforcement in situations where projects accumulate 4.0 or more Points, Staff must document the reasons for overriding the Point Assessment Criteria mechanism. Staff should also refer to the Division of Enforcement Guidance Memorandum No. 1-2005 (Revision 1) when deciding how to address noncompliance.

Staff should only issue additional NOVs for specific violations if the responsible party has failed to respond adequately to earlier NOVs. Staff should only send multiple NOVs after consulting with the Division of Enforcement.

After the responsible party signs an enforcement action, the Points associated with that action are not combined with any new infractions. Once a regulated party has signed an enforcement action, Staff should no longer issue new NOVs for violations addressed by that enforcement action.

Multiple Occurrences

A single compliance inspection or review may identify multiple incidents of the same type of infraction. These multiple incidents would generally not receive Points separately. For example, if Staff finds multiple locations of unpermitted fill during one inspection at a site, Staff sums the impacts to assign Points. Inspection reports should still indicate if more than one location is impacted and over how many days the discharge has occurred. This information is important for determining the severity of the infraction and for enforcement purposes.

Where multiple Point values are shown in the Point Assessment Criteria table (*e.g.,* 0.5, 1.0, 2.0), the first value (0.5) is assigned to the first occurrence. Where alleged noncompliance is ongoing and the responsible party is not addressing the concerns, then the activity receives the next Point amount. Staff assigns the second and subsequent Point values for infractions where the responsible parties have not responded to correct the problem in the allotted timeframe. For infractions that involve ongoing impacts such as dredging, filling, or excavation, each day is considered a separate incident if the alleged violation continues to occur after Staff has notified the responsible party. Other infractions that do not pose an imminent threat to surface water resources or are not expanding may be allowed additional time to correct noted problems. For example, if the permittee has 30 days to comply with the permit conditions and is delinquent, the infraction would be elevated to the next Point level.

VI. ASSESSING NONCOMPLIANCE AND DETERMINING APPROPRIATE COMPLIANCE ACTIONS

A. Exceeding Permitted Impacts or Unpermitted Impacts

Using the Point Assessment Criteria, unpermitted activities are assessed Points for failure to obtain coverage under a VWPP Program general or individual permit. Similarly, Staff also assesses Points for impacts to State waters beyond permit limitations (i.e. permit exceedances). Unpermitted impacts or permit exceedances are categorized according to the size of the impact (*see* Appendix A, Table 1). Major unpermitted impacts are assigned 4.0 Points and receive a NOV, automatically referring the case to the Division of Enforcement. Major exceedances are assigned between 1.0 and 4.0 Points, dependant upon the individual circumstances of the case. This provides Staff some flexibility in assigning Points on a case-by-case basis. Minor unpermitted impacts are assigned 2.0 Points and receive a WL. Minor exceedances are assigned between 1.0 and 2.0 Points, dependant upon the individual circumstances of the case. Again, this provides Staff some flexibility in assigning Points on a case-by-case basis. Points are assigned for the cumulative amount of unauthorized impacts, not the number of occurrences on a site associated with a specific activity. For example, if Staff discovers that a permittee has taken 50 linear feet of total impacts at two locations on the project site while constructing roadways, the project receives 1.0 to 2.0 Points total for a minor exceedance. The permittee would not receive 2.0 to 4.0 Points (i.e. not 1.0 to 2.0 Points for each exceedance).

Aggravating Factors

Classification of an unpermitted impact or permit exceedance as major or minor is based on the size of the impact (*see* Appendix A). However, Staff can also assign additional Points based on other factors associated with unpermitted impacts or permit exceedance. Factors include, but are not limited to the following:

- The acreage or linear feet of fill material (where it exceeds permit reporting or modification thresholds);
- Presence of threatened, endangered, or rare species and habitats;
- Compliance history;
- Impacting wetlands avoided through permit negotiations;
- Wetland or stream type and/or quality;
- Landscape or regional considerations (amount of impact in comparison to size of watershed);
- Whether the landowner was notified that a permit was required;
- Substantial economic benefit;
- If the construction plans indicate additional impacts are still required to complete the project.

In cases where unpermitted impacts or exceedances have occurred, and the responsible party has self-reported, is cooperative, and/or consents to restore the impact after notification, Staff can, on a case-by-case basis, work within the VWPP Program to determine the appropriate compliance response. For example, general permit conditions allow for additional temporary impacts without a notice of planned change, provided that DEQ is notified in writing, the additional temporary impacts are restored to preexisting conditions, and impacts do not exceed the general permit threshold for use (i.e. impacts qualify as a minor exceedance). In cases such as these, informal corrective action would be the appropriate response, as long as the general permit conditions are adhered to in regards to reporting and restoring the temporary impacts. Staff should work closely with the responsible party to restore the area to preexisting conditions.

However, if corrective actions requested by the VWPP Program do not occur within an agreed-upon timeline or are unsatisfactory, Staff should consider issuing a WL or referring the case to the Division of Enforcement with a NOV. In accordance with the Division of Enforcement Guidance Memorandum No. 1-2005 Notices of Alleged Violation (NOAVs) (Revision 1), informal correction is appropriate for deficiencies or violations that can be corrected within 30 days and WLs are appropriate for deficiencies or violations that can be corrected within 90 days. If restoration or correction will take longer, then a referral to the Division of Enforcement may be necessary. Regardless of the compliance response type, any required restoration must adhere to established techniques for restoring streams or wetlands in accordance with an approved Corrective Action Plan that includes a monitoring component to assure success. Please note that since monitoring is typically initiated after restoration actions have been completed, the length of the monitoring period should not be included when calculating the amount of time necessary to complete restoration actions. Therefore, although monitoring periods are typically longer than 90 days in duration, this does not mean that a NOV is automatically warranted.

Occasionally, the Division of Enforcement will de-refer cases sent to them when the merits of the case do not justify continued involvement. Enforcement staff should develop and place a case closure memorandum in the VWPP Program and Division of Enforcement files, providing a reasoned analysis for the de-referral. Depending on the nature of the incident, Staff may continue working with the responsible party to correct environmental damages without Division of Enforcement involvement. If Staff cannot obtain a satisfactory resolution, then Staff should consult with the Division of Enforcement before issuing a new NOV for cases that have been previously de-referred. For some cases, Staff should not continue to pursue compliance once the case is closed. If the VWPP Program is considering permitting the activity, then Staff must follow program guidance regarding resolving unpermitted impacts to surface waters in accordance with DEQ Division of Enforcement and Water Division Joint Guidance Memorandum No. 09-2009 Resolving Unpermitted Impacts to Surface Waters with Enforcement Actions (dated July 28, 2009).

B. Administrative Noncompliance

Timely discovery of administrative noncompliance, such as delinquent reports or notifications, is necessary to refer these infractions to the Division of Enforcement. The total Points calculated in a comprehensive compliance review includes only administrative noncompliance that occurred within the previous 12 months (i.e. the date of noncompliance is no more than 12 months prior to the date noncompliance was discovered). For the purpose of the Point Assessment Criteria calculations, the age of an administrative noncompliance Point is determined using the date of the noncompliance, not the date which Staff discovered the noncompliance. Although not part of the Point Assessment Criteria calculation, Staff must still note any delinquent requirements discovered during the comprehensive compliance review that are greater than 12 months old. These older infractions may support a future enforcement case.

Resolving administrative noncompliance depends on the benefit of receiving the required documents. If receiving late reports or notifications does not provide any benefit, the permittee should be notified regarding the noncompliance and informed that, although the delinquent document is no longer required, enforcement action may be taken.

Staff should not request delinquent documents if:

- The document is past due and receiving the information would not provide any valuable compliance information;
- The permittee has no intention of submitting the document and the case will be referred to the Division of Enforcement; and/or
- The project is complete and the responsible party cannot create the documents or the documents would not provide useful information.

Staff should still require some late submittals to show compliance with permit conditions, such as preservation plats, proof of recordation of protective instruments, proof of credit purchase, or compensation monitoring reports.

If the permittee did not submit compensation monitoring reports or water withdrawal reports as required, then the monitoring period must start over, which may necessitate a permit extension. For example, if a permittee did not provide annual reports for five years as required, then they would be required to conduct five years of monitoring and reporting as required by the permit. However, in the case of compensation monitoring reports, if the responsible party can demonstrate that the compensation site has met or exceeded the required success criteria, continued monitoring may not be necessary.

C. Expired Permits

Staff should evaluate permit compliance prior to expiration in order to provide more options for addressing alleged violations. Staff should evaluate expired permits for compliance with specific permit conditions and assign Points in the same manner as for an active permit. Administrative violations within 12 months of permit expiration remain referable violations. For expired permits, Staff should consider issuance of a NOV only in consultation with the Division of Enforcement.

For expired permits, Staff must confirm, at a minimum, that:

- Permitted impacts were taken in accordance with the original permit;
- If additional impacts were taken, Points are assessed in accordance with the "Exceeding Permitted Impacts" infraction (Point Assessment Criteria – Table 1); and
- Compensation was completed in accordance with State Water Control Law and original permit conditions regarding the location and mitigation ratios.

If these conditions are not met, a NOV may be warranted.

VII. DOCUMENTING AND TRACKING NONCOMPLIANCE

At a minimum, documentation of alleged noncompliance found during a site inspection (onsite violations) must include:

- Field notes and/or inspection forms;
- Delineation data sheets (as necessary for unpermitted impacts);
- Photographs with supporting descriptive information;
- Inspection report summarizing the findings;
- Maps or drawings showing the location and extent of alleged noncompliance;
- Points Assessment Criteria calculation worksheets; and
- Any required CEDS data entry.

Tracking Administrative Requirements

Staff should have a mechanism in place for periodic compliance audits. For example, Staff can generate monthly or quarterly audit reports of scheduled and delinquent compliance events (monitoring reports, notifications, etc.) to identify those responsible parties that are not in compliance with administrative permit conditions. Database audits, carried out through CEDS, Discoverer, or Access queries, can identify delinquent submittals and track noncompliance. Regional Staff should prioritize Staff time and operate within workload constraints to conduct inspections of construction and compensations sites. Staff can use delinquency reports in conjunction with onsite inspections and comprehensive compliance review information to assess overall noncompliance.

Appendix A. Point Assessment Criteria.

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Unpermitted Failure to obtain coverage under a VWPP General or Individual Permit prior to commencing activity:				For unpermitted activity, assess Points for this infraction only. Do not use any of the other onsite infractions listed. Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor. Individual impacts are generally not assigned Points separately. Inspection reports should still indicate if more than one State water is impacted and over how many days the discharge has occurred. Major Unpermitted Impact: Generally, impacts that exceed 0.10 acre of wetland or open water, or 300 linear feet of streambed, and water withdrawals greater than or equal to 90 million gallons per month are considered major and should require a NOV. However, these acreage and linear feet impact thresholds serve only as a guide for assessing alleged noncompliance. The facts of the case must be considered carefully regardless of the size of impacts. Smaller impacts to more significant aquatic resource functions may also be considered major. Minor Unpermitted Impacts: Generally, impacts to less than 0.10 acre of wetland or open water, or 300 linear feet of streambed, and water withdrawals less than 90 million gallons per month can be considered minor based on the particular facts of the case.
Major Unpermitted Impacts	4	4	4	
Minor Unpermitted Impacts	2	2	2	

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Exceeding Permitted Impacts				Minor Exceedance: below minor modification/notice of planned change thresholds
Major Exceedance	1-4	1-4	4	Major Exceedance: above minor modification/notice of planned change thresholds
Minor Exceedance	1-2	1-2	4	Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor; individual impacts are not assigned Points separately Impact thresholds serve only as a guide for assessing alleged noncompliance; the facts of the case must be considered carefully regardless of the size of impacts; smaller impacts to more significant aquatic resource functions may also be considered major, whereas larger impacts in context with a larger permitted impacts may be considered minor

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Compensatory Mitigation Failure to conduct compensatory mitigation in accordance with approved mitigation plan as follows:				If compensation work was not performed in accordance with the approved plan or was not completed, the Points allocated for this infraction should be assigned after considering the degree of variance from the approved compensation plan, extent of fulfillment of "no net loss" requirements, and the level of cooperation demonstrated by the permittee in regards to corrective action; for example, a compensation site at the end of its monitoring period is found to be a PEM wetland instead of a PFO wetland, as designed, and the permittee refuses to complete the required corrective action – this infraction should be assigned a higher Point value (4.0 Points) than an infraction in which the required number of groundwater monitoring wells have not been installed at a compensation site (1.0 to 2.0 Points)
Onsite or off-site creation, restoration, or enhancement not initiated	4	4	4	
Failure to purchase bank credits, contribute to in-lieu fee fund, record preservation deed restrictions, etc.	4	4	4	
Late purchase of bank credits, contribution to in-lieu fee fund, recordation of preservation deed restrictions, etc.	2	2	2	
Compensation work not performed in accordance with approved plan or not completed	1-4	1-4	1-4	
Construction Special Conditions Failure to comply with required construction special conditions (such as stormwater management, E&S controls, flagging non-impact areas, restoring temporary impacts, working in the dry, time of year restrictions, minimum stream flow, sidecasting in streams, operating equipment in streams, discharge of concrete to waters, etc.):				If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table
With Major Impact to Surface Waters	2	4	4	
With Minor Impacts	1	1	2	
With No Impact	0.5	0.5	1	

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Water Withdrawals				If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table
Intake modification without notification/permit	2	4	4	
Build or replace dam without notification/permit for construction and/or increased withdrawal	2	4	4	
"Grandfathered" users increase withdrawal without first obtaining a permit	2	4	4	
Corrective Action				Where permittee has been notified of alleged noncompliance and Staff has requested corrective actions in writing that have not been implemented by the permittee
Failure to undertake required corrective action	2	2	2	
Failure to undertake required corrective action resulting in failure to meet success criteria	4	4	4	
Failure to conduct required water quality monitoring	2	4	4	
Any activity resulting in a fish kill; failing to report a fish kill, fuel, or oil spill	4	4	4	

Table 2. Administrative Violations

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Construction Monitoring				Permittee must be notified of the initial late submittal and Points assessed; if the required submittal is not received within the period requested, then the violation would be assessed additional Points using the Point level for the next occurrence; this repeats until the case is referred to the Division of Enforcement Each report required is assigned Points and tracked separately; for example, if 3 monthly CMR's were required, failure to submit each would be considered a violation and would receive 0.5 Points for a total of 1.5 Points; however, the Point values are not elevated to the 2nd or additional occurrence unless the permittee has been notified and does not respond
Failure to submit construction monitoring report within the required timeframe	0.5	1	1.5	
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	
Compensation Monitoring				
Failure to submit compensation monitoring report within the required timeframe	1	2	2	
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	
Failure to provide copies of conservation easements or preservation plats within the required timeframe	0.5	1	1	Deed restriction has been recorded, but notice was not provided to DEQ
Failure to provide proof of credit purchase or trust fund payment within the required timeframe	0.5	1	1	Credit purchased or trust fund payment was made, but notice was not provided to DEQ
Failure to submit a complete final mitigation plan within the required timeframe	1	2	2	

Table 2. Administrative Violations

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Water Withdrawal Monitoring				Permittee must be notified of the initial late submittal and Points assessed; if the required submittal is not received within the period requested, then the violation would be assessed additional Points using the Point level for the next occurrence; this repeats until the case is referred to the Division of Enforcement
Failure to submit water withdrawal monitoring report within the required timeframe	0.5	1	1.5	
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	Each report required is assigned Points and tracked separately
Notification				Where several distinct impacts occur at different times, separate notification may be necessary and each would be assessed additional Points
Failure to provide required notice prior to commencing or completing construction or compensation	1	1	1	
Failure to submit plans and specifications for permitted areas prior to initiating construction	0.5	0.5	1	
Other Violations Not Listed Above				Major Harm: Alleged violation related to a documented substantial adverse environmental impact, or presents substantial risk, or has a substantial adverse affect on the regulatory program
Failure to record conservation easements not required as compensation, include certification statements, submit as-built surveys, provide permit transfer notification, etc.				Minor Harm: Alleged violation presents little or no risk of environmental impact, or has little or no adverse effect on the regulatory program
Failure to submit required information so as to prevent a determination of compliance or violation resulting in Major Harm	1-3	1-3	4	
Information is not required in order to determine compliance or, violation resulting in Minor Harm or no environmental harm	0.5	0.5	1	

Table 3. Aggravating Factors

Not withstanding the above, any infraction with the following characteristics may be considered an aggravating factor. This should be determined on a case-by-case basis and in consultation with the Division of Enforcement.

Infraction	Points			Notes
	1st Occurrence	2nd Occurrence	Additional Occurrence	
Staff can also assign Points for additional factors associated with unpermitted impacts or permit exceedances. Factors include but are not limited to: Adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger to human health or the environment	4	4	4	Adverse environmental impact, loss of beneficial use, or imminent danger must be documented Typical factors include impacts to threatened, endangered, or rare species and habitats, compliance history, impacting wetlands avoided through permit negotiations, wetland type and/or quality, landscape or regional considerations (amount of impact in comparison to watershed), landowner notification of permit requirement, substantial economic benefit, and additional impacts required to complete the project; other factors may also be considered (*see* Section VI.A)
Potential for adverse impact or loss of beneficial use	2	2	2	Potential for secondary effects to cause adverse impact(s) to beneficial uses; impact is expected but has not occurred yet; for example, presence of or potential impacts to threatened, endangered, or rare species and habitats
Violations resulting in exceedance of water quality standards	2	2	2	For example, use of improper E&S controls within stream channels may result in impounding water or impeding flow, effecting temperature, pH, and/or dissolved oxygen levels
Suspected falsification	4	4	4	
Suspected willful violation	4	4	4	
<u>Site Access Violations</u> Failure to provide reasonable access otherwise required by statute or permit to any facilities where there is adverse environmental impact or an imminent and substantial danger Other site access violations	4 1	4 3	4 3	

Appendix B. Point Calculation Worksheet.

Project Name: _____
Permit/PReP Number: _____
Point Assessment Date: _____

	Comprehensive List of Infractions			
	Infraction	**Points**	**Date of Noncompliance**	**Date Noncompliance Corrected**
	List all infractions	*List Points for each infraction*	*List the date of noncompliance for each infraction*	*List the date the noncompliance was corrected*
Onsite				
Administrative				
Aggravating Factors				

Table used to summarize infractions found over the life of a project; List includes new violations, along with old violations previously addressed

<u>Noncompliance Determination</u>

_____ **Onsite Points**

_____ **Administrative Points <12 months old**

_____ **Aggravating Factor Points**

_____ **Total**

_____ _____

VWPP Program Staff Signature Date

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.
DIRECTOR
P.O. BOX 1105 Richmond, VA 23218

SUBJECT: **Guidance Memorandum No. 09-2012, Amendment No. 1 – Applying the Freedom of Information Act Exemption of Location Information to DEQ Water Division Permit Files**

TO: Regional Directors, Regional VWPP and Water Permit Managers, Water Division Staff, Diana Monroe

FROM : Ellen Gilinsky

DATE: November 23, 2009

COPIES: **Tom Smith, Director, Division of Natural Heritage, DCR; Julie Langan, Director Division of Resources Service and Review, DHR; Raymond Fernald, Manager of Nongame and Environmental Programs, DGIF**

SUMMARY:
The Virginia Freedom of Information Act (FOIA), located at § 2.2-3700 et seq. of the Code of Virginia, guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees. This amendment describes DEQ Water Division procedures for identifying records that may be withheld pursuant to the Freedom of Information Act (FOIA) because the record reveals the location of a protected resource and is therefore not subject to FOIA pursuant to § 2.2-3705.7(10) of the Virginia Code. This procedure ensures that DEQ is meeting the rights of citizens when details about the location of a protected resource are withheld from a FOIA response.

Guidance Memorandum No. 09-2012 was originally issued on August 18, 2009. This amendment clarifies that, in most cases, standard practice should be to redact certain location information from a document rather than withholding the entire document.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov/waterguidance/.

Contact Information:
Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Purpose

This guidance amendment describes Water Division procedures for identifying records that reveal the location of a protected resource and therefore may be withheld from a FOIA response pursuant to § 2.2-3705.7(10) of the Virginia Code. This procedure ensures that DEQ is meeting the rights of citizens when details about the location of a protected resource are withheld from a FOIA response.

II. Background and Authority

The Virginia Freedom of Information Act (FOIA), located at § 2.2-3700 et seq. of the Code of Virginia, guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees.

A public record is any writing or recording, regardless of whether it is a paper record, an electronic file, an audio or video recording, or any other format, that is prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. All public records are presumed to be open, and may only be withheld if a specific, statutory exemption applies.

The purpose of FOIA is to promote an increased awareness by all persons of governmental activities. FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld must be interpreted narrowly.

There is an exemption to disclosure under FOIA at § 2.2-3705.7(10) for "records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information disclosure of the information would jeopardize the continued existence or integrity of the resource." This exemption is relevant to certain documents in DEQ Water Division files.

The DEQ is authorized to issue the following water permits in accordance with the indicated sections of SWCL and regulations:

- VPDES permit for point source discharges of treated wastewater to surface waters per the Virginia Pollutant Discharge Elimination System Permit Regulation (9VAC25-31).
- VPA permit for pollutant management activities that protect surface and ground waters, but do not have a point source discharge to surface waters per the Virginia Pollution Abatement Permit Regulation (9VAC25-32). More specifically, 9VAC25-32-250 gives authority to DEQ to issue a VPA permit for agricultural production activities that involve animal feeding operations.
- VPDES or VPA permit for facilities producing or distributing reclaimed water per the Water

Reclamation and Reuse Regulation (9VAC25-740).
- VWP permit for impacts to state waters per §§ 62.1-44.15:20 and 62.1-44.15:21 of SWCL and the Virginia Water Protection (VWP) Permit Program Regulation (9VAC25-210).

To ensure that water permit issuances comply with state and federal law, Water Division Staff must be aware of the ranges, probability of occurrence, and site specific locations of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, and caves in the vicinity of locations being permitted. Where DEQ is performing permit actions on behalf of the Federal Government, historic and archaeological sites must also be identified in the vicinity of locations being permitted. Water Division Staff routinely obtain site specific location information from private consultants and other state agencies to inform permit decisions. However, when release of site specific location information could jeopardize the continued existence or integrity of the resource, the site specific location information will be withheld from disclosure.

III. Applying the Freedom of Information Act Exemption of Location Information to DEQ Water Division Permit Files

Specific locations of certain species, natural communities and cultural resources may be withheld under FOIA (See § 2.2-3705.7(10) above) and will not be released in response to FOIA requests when the information could jeopardize the continued existence or integrity of the resource.

When information in the permit file reveals the documented, site specific location of a protected resource (e.g. a green floater mussel population was found between river-mile 14 and 14.5 of the Little Green River), staff should invoke the FOIA exemption unless staff is aware that the information is already in the public domain.

Records in the permit file documenting that no resource was found or describing a range or suspected occurrence of a protected resource, are subject to FOIA (e.g. the green floater mussel is known to occur within two miles of the proposed project site, or the Virginia pigtoe mussel has been historically documented in the James River).

The exemption is invoked by redacting from the document the pertinent language identifying the location of the protected resource, and placing an unredacted copy of the same document(s) in a subfolder labeled, "FOIA Exempt." In the case of Electronic Content Management files, the unredacted copy should be saved separately and identified as FOIA exempt using the appropriate document type, file series, or metadata. In certain cases it may be appropriate to withhold an entire document (e.g. a scientific report with numerous descriptions and diagrams revealing the location of the protected resource). Prior to withholding an entire document, staff must consult with the office FOIA Coordinator, office management and/or the agency FOIA Officer.

In the location within the file, where the redacted and/or exempt documents were located (e.g. as part of the permit application, or inter-agency review correspondence) a completed form letter

should be inserted informing citizens or staff viewing the file that FOIA exempt materials were relocated. The form letter must identify the nature of the withdrawn document(s) (*See* attached template document).

In summary, documents that are not subject to FOIA, either wholly or in part, will be identified twice in DEQ files. The form letter, with the redacted document if applicable, will be placed in the project file. The withheld document or unredacted document will be placed in an alternate file (electronic or paper), that is identified as "FOIA Exempt".

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

VIRGINIA FREEDOM OF INFORMATION ACT
EXEMPT DOCUMENT NOTIFICATION

Pursuant to § 2.2-3705.7(10) of the Virginia Code, following information is not subject to mandatory disclosure:

> "*records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information disclosure of the information would jeopardize the continued existence or integrity of the resource*."

The following FOIA-exempt information was removed from these records.

___ Site specific location of rare, threatened, or otherwise imperiled plant and animal species, natural communities, and/or caves.

___ Site specific location of significant historic and/or archaeological sites.

AND/OR

The following document(s) was withheld pursuant to § 2.2-3705.7(10) of the Freedom of Information Act:

___ List document name, type, date (e.g. Broad Run Archaeological Survey, April 2000; or Fish and Wildlife Service T & E Consult, December 2007))

Please feel free to contact the coordinator if you have any questions or wish to discuss your request in further detail. The coordinator is the person responsible for compiling the FOIA response in the location where the document resides.

JOINT GUIDANCE MEMORANDUM

DIVISION OF ENFORCEMENT
AND
WATER DIVISION

P.O.BOX 1105 Richmond, VA 23218

SUBJECT: Guidance Memorandum No. 09-2009 – Resolving Unpermitted Impacts to Surface Waters with Enforcement Actions

TO: Regional Directors, Regional VWPP/Water Permit Managers, VWPP Staff, Enforcement Staff

FROM: Ellen Gilinsky, Ph.D., Director, Water Division

Melanie D. Davenport, Director, Division of Enforcement

DATE: July 28, 2009

SUMMARY:

In the past, DEQ has sometimes achieved compliance for unpermitted impacts to surface waters by conducting an enforcement action against the responsible party and then engaging in the permit process to authorize the unpermitted activity. This guidance establishes the use of enforcement actions in lieu of permits for unpermitted impacts to surface waters involving environmental harm or ongoing non-compliance. When additional surface water impacts are proposed for a site involving previous unpermitted impacts to surface waters, this guidance requires an independent utility analysis to determine the cumulative impact of the project. This guidance also establishes procedures for using general and individual permits for projects involving previous unpermitted impacts.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov/waterguidance/.

Contact Information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Purpose

This guidance establishes that the practice of "after-the-fact"[1] permitting is unacceptable for cases with major unpermitted impacts and major exceedances, and describes the process for addressing those unpermitted impacts with a collaborative effort between enforcement and Virginia Water Protection Permit (VWPP) Program staff. This guidance does not apply to permitting and enforcement of unpermitted impacts for Virginia Department of Transportation (VDOT) projects[2], Emergency VWPPs[3], or issuance of State Program General Permits (SPGP)[4].

II. Background and Authority

Enforcement Actions versus After-the-Fact Permits for Unpermitted Impacts

Previously, DEQ achieved compliance for certain unpermitted impacts by conducting an enforcement action against the responsible party and then engaging in the permit process to authorize the unpermitted activity. Or in other situations, there was no enforcement action and the permit was issued after the impact was taken. The resulting permit was called an "after-the-fact" permit. After-the-fact permitting legitimizes unpermitted activities and circumvents the required regulatory review and oversight to avoid and minimize impacts. Therefore, rather than issuing after-the-fact permits for major unpermitted impacts, it is more appropriate and more in-line with the regulatory goals of the VWPP Program for DEQ to conduct enforcement actions for unpermitted impacts. Regional VWPP staff will use standard permitting methodologies to review the avoidance/minimization and compensation in collaboration with enforcement staff during the development of injunctive relief. This guidance does not change the current practice of VWPP staff evaluating permit applications for new impacts on sites where previous unpermitted impacts have occurred.

An enforcement action is better suited for addressing unpermitted impacts which result in environmental harm, as compared to the permit process for the following reasons:

- Certain enforcement actions can provide additional scrutiny by being subject to public comment where a general permit is not.
- Enforcement staff has more flexibility to apply greater mitigation ratios than do permitting staff potentially serving as deterrence to future noncompliance. See, Wetland Compensation Ratios. Guidance Memorandum 00-2003. Feb. 1, 2000.
- Enforcement actions remove the economic incentive for non-compliance by capturing any

1"After-the-fact" permit is a widely used term to describe a permit issued after unpermitted impacts have commenced.

2 See Memorandum of Understanding between VDEQ and VDOT for Virginia Water Protection Permit Process Streamlining, November 2007.

3 See 9 VAC 25-210-80 D 1-2

4 See 07-SPGP-01 at http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/RBregional.asp

benefit of noncompliance that may exist.

- Enforcement actions can require restoration of unpermitted impacts in a legally binding action.

Regulation of State Waters

State Water Control Law (§§ 62.1-44.15 and 62.1-44.15:20-23) gives DEQ the authority to regulate excavating, filling and dumping, and activities that "alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."

The Code of Virginia 62.1-44.15(8d) authorizing the use of Consent Orders, states:

> "With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a)."

The Code of Virginia (§10.1-1186) authorizing enforcement activities, states:

> "Notwithstanding any other provision of law and to the extent consistent with federal requirements, following a proceeding as provided in § 2.2-4019, issue special orders to any person to comply with: (i) the provisions of any law administered by the Boards, the Director or the Department, (ii) any condition of a permit or a certification, (iii) any regulations of the Boards, or (iv) any case decision, as defined in § 2.2-4001, of the Boards or Director."

The VWPP Program Regulation (9 VAC 25-210-240) identifies DEQ enforcement staff as the lead for unpermitted surface water impacts**:**

> "The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and §10.1-1186 of the Code of Virginia."

III. Definitions

The definitions in 9 VAC 25-210-10 of the VWPP Program Regulation and VA Code § 2.2-4001 apply to this guidance. The following definitions are especially pertinent to this guidance:

Enforcement action: means any action taken by the Division of Enforcement, including but not limited to a Consent Special Order, a Special Order issued after a formal or informal hearing, a Letter of Agreement, or a referral to the Office of the Attorney General. The term enforcement action does not include dereferral of a case.

Independent utility: A test to determine what constitutes a single and complete project. A project is considered to have independent utility if it "would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the development project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent utility. The independent utility test includes physical features (infrastructure) and economic factors.[5]

Major exceedance: Permitted project where unauthorized activity exceeds minor modification/notice of planned change thresholds (For specific thresholds, see 9 VAC 25-210-180, 9 VAC 25-660-80, 9 VAC 25-670-80, 9 VAC 25-680-809, VAC 25-690-80). Major exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment and the effects on the statutory and/or regulatory purpose.

Major unpermitted impacts: Applies to projects where no permit was obtained in advance and unpermitted impacts require compensatory mitigation, (e.g. typically unpermitted impacts exceeding 0.10 acre of wetland or open water or 300 linear feet of streambed impact). Major Unpermitted Impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human heath or the environmental and the effects on the regulatory program.

Minor exceedance: Permitted project where unauthorized activity is equal to or below minor modification/notice of planned change thresholds (For specific thresholds, 9 VAC 25-210-180, 9 VAC 25-660-80, 9 VAC 25-670-80, 9 VAC 25-680-809, VAC 25-690-80). Minor exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human heath or the environmental and the effects on the regulatory program.

Minor unpermitted impacts: Applies to projects where no permit was obtained in advance and unpermitted impacts do not require compensatory mitigation, when permitted, (e.g. typically unpermitted impacts less than 0.10 acre of wetland or open water or 300 linear feet of stream bed and no special resources such as threatened and endangered species).

No net loss: Compensating for project impacts sufficient to replace existing wetland acreage and functions in all surface waters (9 VAC 25-210-116).

Single and complete project: The total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers which also has independent utility. A project may be considered to be "single and complete" if it can be

5 Definition is from USACE & DEQ, June 19, 2007, Federal Public Notice: Subdivision Recommendations. See also Fed. Reg. 2020, 2094 (Jan. 15, 2002). A single and complete project was defined by *Crutchfield v. County of Hanover*, 325 F. 3d 211 (4th Cir. 2003) as the total project proposed or accomplished by a single entity.

constructed independent of any reliance on subsequent or previous permit authorizations (i.e., activities preceding or following those under the current authorization).[6]

Significant alteration or degradation of existing wetland acreage or function: Human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions (9 VAC 25-210-10).

IV. Resolving Unpermitted Impacts to Surface Waters

VWPP staff should use current guidance and point systems to determine if unpermitted surface water impacts should be referred to enforcement or addressed independently by VWPP staff. In general, unpermitted impacts causing significant adverse impact to the environment (e.g. major unpermitted impacts and major exceedances) or on-going non-compliance are issued a Notice of Violation (NOV). Therefore, the case is referred to the DEQ's Division of Enforcement for resolution. When it is determined that an enforcement action is warranted to resolve unpermitted impacts, enforcement staff and permitting staff should collaborate to ensure that all of DEQ's interests are addressed in the injunctive relief section of the enforcement action. When an enforcement action is not warranted, VWPP staff should follow standard compliance procedures and additional permitting procedures provided in this guidance.

Developing Enforcement Actions

For the majority of cases, Regional VWPP staff and enforcement staff will collaborate to review the avoidance/minimization and restoration analysis necessary for the enforcement action (injunctive relief). Regional VWPP staff and enforcement staff will continue to collaborate to document special resources (e.g. Federal or State listed threatened and endangered species, impaired waters, waters with anadromous fish). VWPP Regional Office staff should collaborate with the VWPP Central Office staff to review the avoidance/minimization and restoration analysis for cases involving topics of particular concern or cases of first impression (e.g. precedent setting cases or new issues). The VWPP regional staff will use standard permitting methodologies for assessing avoidance, minimization, and compensation of unpermitted impacts as a starting point. This includes using the standard ratios for compensatory mitigations (e.g. 2:1 for Palustrine Forested Wetlands). Where the avoidance and minimization requirements have been circumvented, a higher mitigation ratio may be justified to ensure a no net loss of function in all surface waters. Regional enforcement staff and VWPP staff should calculate additional compensation requirements necessary in order to account for temporal and/functional loss (e.g. conversion from palustrine forested wetland to scrub-shrub wetland or loss of unique or critical habitats). Enforcement will also develop the civil charge, which at a minimum, must capture the economic benefit of noncompliance. The enforcement action may contain long term monitoring requirements that in the past were captured in the after-the-fact permit; this change establishes noncompliance as a breach of the Consent Order which may be referred to the

6 Id.

Attorney General's Office.

The United States Army Corps of Engineers (USACE) can issue a Nationwide Permit 32 (NWP 32) for unpermitted impacts resolved through the USACE. DEQ has provided 401 certification for the NWP 32. Therefore, DEQ can forego mitigation requirements and enforcement action if DEQ determines that no further resolution is necessary. However, a decision by the USACE to issue a permit or to forgo enforcement action is not determinative of the DEQ's response. DEQ can still issue an enforcement action, such as a consent order and penalty. VWPP staff should use the 4-point threshold and best professional judgment to determine if the unpermitted impacts should be referred to enforcement.

*Unpermitted Impacts **not** Resolved Using an Enforcement Action*

There are limited situations where an unpermitted impact will not be resolved using an enforcement action. They include:

- the case is not referred to enforcement (e.g. minor unpermitted impacts and minor exceedance);
- enforcement derefers the case[7];
- the unpermitted impact did not require a VWP permit; or
- regional or agency leadership decision to not pursue enforcement.

Where unpermitted impacts do not create a significant alteration or degradation of surface water function nor warrant referral to enforcement, VWPP staff should review the case closely to ensure no additional factors such as presence of threatened and endangered species, compliance history, or sedimentation from improper erosion and sediment control would elevate the unpermitted impact to a higher point level and warrant referral to enforcement.

Where the Division of Enforcement does not pursue an enforcement action, enforcement staff must complete a case closure memo to provide a reasoned analysis for the decision. The memo will be maintained in enforcement files and copied to the permit file if one exists.

If the project's cumulative impacts would not have required a permit (e.g. no surface water impacts or the activity is excluded from VWPP Regulation, or the USACE issues a permit with 401 certification) no enforcement action is required. The case may be processed by VWPP staff after the responsible party submits a Joint Permit Application (JPA), typically with a "no permit required" letter.

Unpermitted impacts that would have required a permit and, which are not referred to enforcement (less than 4 points[8]) or de-referred using a case closure memo, can be addressed

7 For example, unauthorized impacts to isolated wetlands of minimal ecological value may not warrant a Consent Order but must be reviewed on a case-by-case basis.

8 The DEQ Enforcement Manual (12/1/1999) establishes procedures for referral of cases to enforcement for those facilities that accumulate 4 or more points during the prior 6-month period.

through compliance and permitting procedures (e.g. through a corrective action plan). If VWPP staff determines that mitigation is required, they can require mitigation by issuing an after-the-fact permit. If no compensatory mitigation is necessary no permit needs to be issued for the project. The impact amounts should be documented in the VWP Comprehensive Environmental Data System (CEDS) compliance module (when available).

A future permit application that proposes additional impacts must account for the cumulative impact of the project by determining if it is a single and complete project. Where the cumulative impacts meet the VWP general permit requirements, but concerns for water quality and the aquatic environment would benefit from the increased review and analysis, VWPP staff may require a VWP individual permit. *See*, 9 VAC 25-210-130 (B).

For all VWP permits, applicants use the JPA process to apply for future impacts, regardless of past activity on the site. The JPA requires an applicant to report any previous impacts to state waters. Applicants for VWP permits must identify all impacts, permanent and temporary; demonstrate avoidance and minimization to the maximum extent practicable (*See,* 9 VAC 25-210-80 (B) (1)); and demonstrate that the project is the least environmentally damaging practicable alternative (*See,* 9 VAC 25-210-115).

Authorizing Additional Impacts

If the responsible party chooses to proceed with a project that would result in additional surface water impacts, enforcement staff should address all impacts occurring prior to discovery of the violation and VWPP staff will work to process a permit for the proposed impacts. Because these impacts are proposed, not already taken, permitting timelines set forth in the Code apply. VWPP staff will evaluate the proposed project to determine if all unpermitted impacts and proposed additional permitted impacts are a single and complete project. This is done through an independent utility analysis[9].

Where unpermitted impacts occurred for a project, any future permit application to complete the project must consider the cumulative impacts to determine if thresholds for compensation or an individual permit are reached. Unpermitted impacts which have already been (or will be) restored are not considered toward compensation or permit thresholds.

Some examples where additional impacts are often proposed to complete a project include:

- a completed dam with a proposed water withdrawal;
- a partially installed culvert in a stream associated with an incomplete road crossing;
- a complete culvert and road crossing that leads to a building site with additional proposed impacts; or
- a partial commercial and/or residential development with a common scheme.

9 An independent utility analysis is the reasoned analysis, documented in the project file, for making the determination that the proposed project is or is not a single and complete project.

Where the applicant or permittee has been non-compliant (e.g. the proposed project is associated with previous unpermitted impacts) and VWPP staff determines that concerns for water quality and the aquatic environment would benefit from the increased review and analysis, VWPP staff may require a VWP individual permit or major modification for additional impacts of an ongoing project, even if the proposed impacts qualify for a general permit. *See,* 9 VAC 25-210-130 (B)(2). The individual permit process allows increased review and analysis and is often appropriate to address concerns for water quality and the aquatic environment when an unpermitted activity has limited the opportunity for achieving adequate avoidance and minimization.

In cases where a responsible party submits a JPA for an after-the-fact permit and the unpermitted impact meets the 4-point threshold, it may not be possible for the VWPP staff to deem an application complete when the permanent and temporary impacts identified in the JPA are unknown or speculative (*See,* 9 VAC 25-210-80 (B)(1)). The responsible party can not accurately identify total impacts or develop a compensatory mitigation plan because the final impacts are unknown until resolution of the enforcement action (e.g. how much on-site restoration will be required). Furthermore, the responsible party may not be able to submit a complete application if he/she fails to demonstrate that measures were taken to avoid and minimize impacts to surface waters to the maximum extent practicable and that the unauthorized project is the least damaging practicable alternative (See 9 VAC 25-210-115).[10]

Tracking

VWPP staff and enforcement staff should use CEDS and other necessary databases to record all unpermitted impacts and compensation.

V. Examples

Permitting and enforcement decisions are often case-specific. Four examples are provided below to provide some typical case scenarios.

Unpermitted impacts part of an ongoing project

A responsible party, acting without a permit, installs a parking lot causing an unpermitted impact of 0.25-acres of forested wetland. The impact is addressed through an enforcement action requiring the purchase of 0.75 credits at a wetland mitigation bank and a $13,000.00 civil charge. The responsible party then submits a JPA for an additional 0.09-acre impact of forested wetland on the same site. Staff evaluates the project and determines the previous impact and the proposed impact are for a single and complete project. Staff follows the general permit process. While processing the permit application, staff evaluates the whole project's impact (0.34-acre

10 *See*, 9 VAC 25-210-230 for additional authority for VWP permit denial.

impact) on water quality and aquatic life. This is necessary because DEQ has lost flexibility to utilize avoidance and minimization to reduce impacts. DEQ determines that even the 0.34-acre impact causes minimal degradation to surface water function and approves the proposed impacts under a general permit. DEQ requires 0.18 acres of mitigation (in-line with the standard 2:1 ratio) for the additional 0.09-acre impact. The 0.25 would be recorded in the compliance module or other database. In CEDS you would record the permitted impact as 0.09 acre impact and show mitigation.

Two discrete single and complete projects: one unpermitted, one authorized

While building a single family home in 2001, a responsible party impacts 0.40 acres of forested wetland without a permit. The impact is resolved through an enforcement action including a civil charge and compensation (3:1). In 2008, the regulated party submits a JPA for an additional impact to 250 linear feet of stream on the property. DEQ determines that the proposed impact and the previous impact are not a "single and complete project (e.g. the second impact might have independent utility if it is for a road crossing for a barn, a utility line for a second home, etc.). DEQ documents this conclusion in the file with the independent utility analysis and proceeds with permit issuance. Permitting staff determines that the proposed impact does not create concerns for water quality and the aquatic environment and hence an individual permit is not required. DEQ processes the permit using general permit procedures and in accordance with current guidance and stream methodology the permit does not require compensation because the stream impact is less than 300 lf.

Permit modification

A permittee exceeds authorized impacts by 15 linear feet of stream. The permittee self-reports. Based on the point assessment criteria, the permit exceedance does not warrant the issuance of a NOV and referral to enforcement. VWPP staff process a permit minor modification. (See, 9 VAC 25-210-180 (F) (8)).

Minimal unpermitted impacts

VWP staff refers an unpermitted 0.07-acre wetland impact to DEQ enforcement. Enforcement chooses not to pursue an enforcement action or a letter of agreement, because the impact is found to present minimal environmental harm. Enforcement completes a case closure memo and provides a reasoned analysis for the decision. The case closure memo serves as DEQ documentation of the activity and no further permit or enforcement action is necessary. The responsible party proceeds to apply for an additional 1.6-acre impact to wetlands and 100 linear feet of streambed. The VWP regional permitting staff evaluates the application and determines the single and complete project entails 1.67-acre of wetland impact and 100 lf of streambed impact when accounting for the previous unpermitted impacts. There are no on-site opportunities for compensation, and water quality concerns exist due to potential erosion downstream. VWP regional staff proceeds with the VWP individual permit process. A general

permit is not warranted for this case because there are additional concerns for water quality.

In this example, if the responsible party is not seeking additional impacts VWPP staff should document the 0.07-acre impact in the CEDS compliance module.

VI. Conclusion

Unpermitted impacts can be resolved using a myriad of tools, such as warning letters, enforcement actions, or permit modifications. VWPP staff can avoid legitimizing unpermitted activities, which may result in a significant alteration or degradation of existing wetland acreage and loss of function in all surface waters by referring the case to DEQ's Division of Enforcement. Unpermitted activity that earns four points, as calculated under current guidance, must be referred to the regional enforcement staff for evaluation and resolution. The standard permitting process should not be used when four or more points are assessed.

When VWPP staff determines that the unpermitted impacts require an individual permit, such as when the cumulative impacts meet individual permit thresholds or where public comment is needed, enforcement is more than likely warranted. Keep in mind that VWPP staff may require an individual permit in any situation where there were previous unpermitted impacts. Where the VWPP and Division of Enforcement staff agree that an enforcement action is not warranted, VWPP staff can seek resolution through compliance and permitting in a manner that is consistent across all regions.

VWPP staff and DEQ enforcement staff should continue to collaborate to resolve unpermitted impacts to surface waters in the Commonwealth by deterring future noncompliance and working to prevent significant adverse impacts to the environment.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.
DIRECTOR

P.O. Box 1105 Richmond, VA 23218

SUBJECT: **Guidance Memo No. 09-2004 - Applying Compensatory Mitigation Preferences Provided in the EPA Mitigation Rule to Virginia Water Protection Permitting**

TO: Regional Directors

FROM: Ellen Gilinsky

DATE: March 19, 2009

COPIES: VWP Permit Managers, David Davis

Summary:
The purpose of this guidance is to define how the Department of Environmental Quality (DEQ) Virginia Water Protection Permit (VWPP) Program will provide support for the 2008 Compensatory Mitigation Rule[1] (Rule) issued by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE). This guidance outlines how VWPP staff will support the Rule when reviewing and accepting compensatory mitigation packages until the VWPP regulation can be revised to conform to the Rule. The intent of this guidance is to reduce regulatory burden and to eliminate contradictory or duplicative compensation requirements between state and federal wetland regulatory programs. VWPP supports the Rule and concurs with the preference hierarchy presented in the Rule. VWPP staff should facilitate conformity to the Rule when reviewing compensatory mitigation proposals. When documenting the project file, VWPP staff should cite this guidance and the Rule as an applicant's justification for following the Rule's preference hierarchy.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET and for the general public on DEQ's website at: http://www.deq.virginia.gov .

Contact Information:
Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

[1] "Compensatory Mitigation for Losses of Aquatic Resources". 73 Fed. Reg. 19594 (April 10, 2008) (codified at 33 CFR Parts 325 and 332 and 40 CFR Part 230 (http://www.epa.gov/wetlandsmitigation/#plan)

I. Purpose

The purpose of this guidance is to reduce regulatory burden and to eliminate contradictory or duplicative compensation requirements between Virginia Water Protection Permit (VWPP) Program and U.S. Army Corps of Engineers (USACE) resulting from the 2008 Mitigation Rule (Rule). This guidance provides VWPP staff instructions for following the Rule and explains situations under which VWPP staff may differ from the Rule.

II. Background and Authority

Compensatory mitigation is a tool for achieving no net loss of wetland acreage and function and no net loss of stream function after authorized impacts to surface waters have been avoided and minimized through the planning and permitting process.

A. Authority of the 2008 Mitigation Rule

On April 10, 2008, EPA and USACE issued the Rule, which outlines federal standards for compensatory mitigation packages for impacts to surface waters authorized under Section 404 of the Clean Water Act. The Rule gives preference first to mitigation banks, second to in-lieu funds, and third to permittee-responsible mitigation as compensatory mitigation for minor impacts to aquatic resources, and provides scientific support for the sequence.

The Rule emphasizes a watershed approach to compensatory mitigation and presents the following "preference hierarchy" for compensatory mitigation:

First: Mitigation bank credits (purchased from an approved bank that services the impact area)

Second: In-lieu fee fund program credits

Third: Permittee-responsible mitigation (watershed approach as explained later in this guidance)

Fourth: Permittee-responsible mitigation (onsite and in-kind mitigation) with consideration for its compatibility with the proposed project

Fifth: Permittee-responsible mitigation (off-site and/or out-of-kind).

The preference hierarchy was designed to improve the effectiveness of compensatory mitigation at replacing lost aquatic resource functions and acreage, and is based on a large body of science demonstrating that the typical large-scale mitigation project is more efficient and effective than multiple smaller mitigation projects. The Final Environmental Assessment[2] reiterates research findings from numerous studies, which conclude mitigation banks and in-lieu fee fund programs

[2] http://www.epa.gov/owow/wetlands/pdf/MitRule_Regulatory_Analysis.pdf

are the most successful modes for mitigating impacts to aquatic resources. The Final Environmental Assessment provides conclusions such as the following:

1. Replacement wetlands are often sited in unsuitable locations under a system that prefers on-site mitigation.[3]
2. Mitigation banks and in-lieu fee programs have advantages toward achieving the goal of no net loss of wetlands.[4]
3. Mitigation banks provide economy of scale and better ecological performance, which benefits the aquatic environment.[5]
4. Mitigation banks provide ecological benefits in advance of impacts.[5]

Where state and local regulations differ from the Rule's preference hierarchy, the Rule provides flexibility. The supplementary information to the Rule in the Federal Register states: "*If permittee-responsible mitigation is required by a state or local government with regulatory authorities that are similar to the Corps under section 404 of the Clean Water Act or sections 9 or 10 of the Rivers and Harbors Act of 1899, and the mitigation project will appropriately offset the permitted impacts, then the district engineer may determine that the permittee-responsible mitigation is acceptable for the purposes of the DA* [Department of Army] *permit."*

B. Authority of VWPP Program

State Water Control Law (§62.1-44.15 *et seq.*) and the VWPP Program Regulation (9 VAC 25-210 *et seq.*) require that VWPP permittees compensate for surface water impacts, including wetland impacts. The overarching objective of compensatory mitigation, as stated in the VWPP Program Regulation (9 VAC 25-210-116(A)), is to meet "*no net loss…sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters."* The Regulation (9 VAC 25-210-116(C)(1)) refers to on-site, in-kind compensation as ecologically preferable in most cases. However, the Regulation further recognizes that there are cases when off-site mitigation is ecologically preferable and practicable to on-site mitigation and allows off-site or out-of-kind compensation when it is justified through analysis (9 VAC 25-210-116 (B) (1-2)).

Under the Code of Virginia (§ 62.1-44.15:23) and the VWPP Regulation 9 VAC 25-210-116(D)-(F), any mitigation approved by VWPP must be ecologically preferable among proposed mitigation options; provide continuing accountability to VWPP and the public; and demonstrate successful replacement of resource functions provided by surface waters.

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[3] Michigan Department of Environmental Quality (Michigan DEQ). 2001. Michigan Wetland Mitigation and Permit Compliance Study: Final Report. Michigan Department of Environmental Quality, Land and Water Management Division. Lansing, Michigan. 59 pp. plus appendices.
[4] National Research Council (NRC). 2001. Compensating for Wetland Losses Under the Clean Water Act. National Academy Press (Washington, DC).
[5] Federal Register. 1995. Federal Guidance for the Establishment, Use and Operation of Mitigation Banks; Notice. Department of Defense, Environmental Protection Agency, Department of Agriculture, Department of the Interior, Department of Commerce, November 28, 1995. Volume 60, No. 228, pp. 58605-58614.

The VWPP Program Regulation (9 VAC 25-210-116(B)) requires an applicant proposing off-site or out-of-kind mitigation, rather than on-site/in-kind mitigation, to compare the impacted site and replacement site. The Regulation provides criteria for the comparison as follows: "*water quality benefits; acreage of impacts; distance from impacts; hydrologic source and regime; watershed; functions and values; vegetation type; soils; constructability; timing of compensation versus impact; property acquisition; and cost*." The Regulation further states, "*The analysis shall compare the ability of each compensatory mitigation option to replace lost wetland acreage and functions or lost stream functions and water quality benefits*."

III. Definitions

The definitions in 9 VAC 25-210-10 of the VWPP Program Regulation apply to this guidance. For the purposes of this guidance, the term "**approved mitigation bank**" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws, regulations, and guidance for the establishment, use and operation of mitigation banks, and is operating under a signed banking agreement. In contrast, a "**proposed mitigation bank**" means a site under consideration for providing off-site, consolidated compensatory mitigation, but which has not been approved in accordance with federal and state laws, regulations, and guidance.

Definitions pertinent to this guidance from the Rule include the following:

Functions: the physical, chemical, and biological processes that occur in ecosystems (33 CFR 332.2).

Permittee-responsible mitigation: an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility (33 CFR 332.2).

Services: the benefits that human populations receive from functions that occur in ecosystems (33 CFR 332.2).

Temporal loss: the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss (adapted from 33 CFR 332.2).

Watershed: a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean (33 CFR 332.2).

Watershed approach: an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by surface water impacts. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements (33 CFR 332.2).

Watershed plan: a plan developed by federal, tribal, state, and/ or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans (33 CFR 332.2).

IV. EPA Mitigation Rule and Justification for following the Rule under VWPP

VWPP staff should follow the Rule when reviewing compensatory mitigation packages and, in the application or permit file, cite the justification presented in this guidance and the Rule as an applicant's justification for following the Rule's preference hierarchy. The fact sheet or summary sheet in the permit file should state, "The compensation package conforms with the preference hierarchy of the Rule and GM09-2004."

A. Mitigation Banks.

The Code of Virginia (see § 62.1-44.15:23) allows the purchase of bank credits only in the same or adjacent watershed[6] as the proposed surface water impact, which is consistent with the intent of the Rule and the VWPP Regulation. VWPP staff may assert a preference for approved mitigation banks as compensatory mitigation based on the following justification:

1. Mitigation Banking Instruments (MBI) require thorough planning and monitoring of mitigation.
2. The Interagency Review Team (IRT) only releases credits from banks when the IRT agrees that the surface water mitigation is meeting certain success criteria or when plans for a successful mitigation bank have been approved.[7]

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[6] Defined in the Hydrologic Unit Map of the United States, U.S.G.S. 1980, except for parts of the Tidewater area. See DEQ Guidance Memorandum 02-2012 "Determination of Service Areas for Compensatory Mitigation Banks."

[7] The Interagency Review Team (or IRT) is an interagency group of federal, state, tribal, and/or local regulatory and resource agency representatives which participate in the development of a Banking instrument and oversee the establishment, use, and operation of a Mitigation Bank with the Corps and DEQ serving as Chair(s). For tidal wetland Mitigation Banks, the Corps and VMRC will serve as Co-Chairs.

3. DEQ recognizes the benefits of having mitigation in place before impacts are initiated, which is more often the case with mitigation banks than with permittee-responsible mitigation.
4. Current science shows that consolidated mitigation is ecologically preferable and fits a watershed approach as compared to permittee-responsible mitigation.

In accordance with 9 VAC 25-210-80 *Application for a VWPP permit,* a permit application can be deemed complete and then processed only if, for projects involving compensation through an approved mitigation bank, the applicant provides certification from the bank owner of the availability of credits. Therefore, a compensation plan using a proposed mitigation bank can not be considered, because no credits are available from the bank at the time of application.

B. In-Lieu Fee Funds.

When mitigation banking opportunities are not available or ecologically preferable, VWPP staff may assert a preference for in-lieu fee compensation over permittee-responsible options because:

1. In-lieu fee projects may involve larger, more ecologically valuable compensatory mitigation projects, which are performed more systematically as compared to permittee-responsible mitigation.
2. The Rule revises and improves the requirements for in-lieu fee programs, which will ultimately require equivalency with the standards imposed on mitigation banks and permittee-responsible mitigation.

There are currently two in-lieu fee funds operating in the Commonwealth of Virginia; the Virginia Aquatic Resource Trust Fund (VARTF) and the Elizabeth River Fund.[8] Both funds must revise their Trust Fund Instrument by July 9, 2010 to be in compliance with the Rule. DEQ is working with the USACE and VARTF to establish a credit system to meet the 2010 deadline. Until such time as VARTF reduces the backlog of project credits in certain basins, VWPP staff should accept in-lieu fee fund compensation on a case by case basis.

C. Permittee-Responsible Mitigation.

VWPP staff may give consideration to permittee-responsible (watershed approach first, on-site/in-kind second, and off-site/out-of-kind third) compensation when a mitigation bank and an in-lieu-fee fund are not the ecologically preferable option. Such circumstances may include the following:

1. Some areas of the Commonwealth lack mitigation bank and in-lieu fee fund options.
2. Certain watersheds or project sites may present particularly preferable restoration, enhancement, creation or preservation opportunities. For example, the watershed may exhibit opportunities for restoring threatened and endangered species habitat, the project site may provide opportunities for stream restoration important to the overall watershed ecology,

[8] Additional information regarding the Virginia Aquatic Resources Trust Fund and the Elizabeth River Restoration Trust may be found at the Department of Environmental Quality website. http://www.deq.virginia.gov/wetlands/mitigate.html.

or the project site may provide the only opportunity for in-kind compensation of unique aquatic resources such as bogs, streams, and sinkholes. Permittee-responsible compensation may provide a unique opportunity for preservation of an exemplary aquatic system. Exemplary aquatic systems meet the criteria provided in "Use of Preservation for Compensatory Mitigation in VWPP Permits".[9]

The Rule allows permittee-responsible off-site or out-of-kind compensatory mitigation when it is the most ecologically preferable option. For example, off-site compensation is often preferable where: 1) mitigation bank and in-lieu fee fund options are not available, 2) in-kind compensation is only available off-site, 3) there are no true onsite opportunities for compensatory mitigation, **and simultaneously** 4) there is not sufficient documentation to identify whether or not the compensation meets a watershed approach. The Virginia Off-Site Mitigation Guidelines[10] (Guidelines) were jointly published by the USACE, DEQ, Department of Game and Inland Fisheries (DGIF), and United States Fish and Wildlife Service (USFWS) through a public notice on March 5, 2008. The Guidelines provide detailed criteria for selecting appropriate locations for off-site compensatory mitigation.

The Rule's preference hierarchy would still allow a combination of bank credits and on-site mitigation. Purchase of bank credits would compensate for lost wetland acreage or stream function, while the on-site mitigation would maintain on-site resource function.

VWPP staff may allow mitigation that differs from the Rule's preference hierarchy in instances when large projects provide opportunities for onsite/in-kind where the compensation site is near or in an impaired watershed[11] and the compensation addresses the impairment. Please refer to Section II in this guidance regarding flexibility where permittee-responsible mitigation is required by state or local government.

V. Documenting the Ecologically Preferable Proposal

VWPP staff will follow the Rule's preference hierarchy unless unique circumstances at the impact site provide an ecologically preferable offset of impacts (e.g. when there are unique aquatic resources on site). In these cases, VWPP staff should coordinate with the appropriate USACE representative to overcome any differing agency objectives and accept a unified compensatory mitigation package.

Section IV of this guidance reiterates recent science, which finds mitigation banks and in-lieu fee funds to be ecologically preferable. The VWPP Regulation (9 VAC 25-210-10) defines ecologically preferable options as having a higher potential to replace, "*existing wetland or stream functions and values, water quality and fish and wildlife resources than alternate proposals*." Section IV of this guidance presents a framework for determining the most ecologically preferable compensatory mitigation option under the VWPP Program. Applicants

[9] See Guidance Memorandum 08-2009 "Use of Preservation for Compensatory Mitigation in VWPP Permits".
[10] See http://www.deq.virginia.gov/wetlands/mitigate.html for a full version of the "Off-site Mitigation Guidelines".
[11] Impaired watersheds and streams are presented on the 303(d) list of impaired streams, see http://www.deq.virginia.gov/wqa/305b2004.html

should cite this guidance and the Rule to document the ecological preferability (see 9 VAC 25-210-116) of a compensation proposal.

Justification for differing from the preference hierarchy presented in this guidance may be provided through a comparison of the impact site and compensation site(s), as described by 9 VAC 25-210-116(B). An example where an analysis is needed is when interested parties (VWPP staff and other state resource agency staff, USACE and other federal resource agency staff, or the property owner) disagree on the ecological preferability of a particular compensation option.

VI. Watershed Approach

The Rule states: "*In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services*".[12] Under the watershed approach, the required compensatory mitigation can be split up into an on-site and off-site component as explained in 33 CFR 332.3(c)(2)(iii). For example: requiring on-site mitigation to enhance water quality functions while also requiring off-site mitigation to replace lost habitat functions.

A watershed approach can be employed whether or not a watershed plan is available. The watershed approach may apply to projects where any of the following are applicable:

1. The applicant has provided sufficient information for VWPP and the USACE to evaluate the project from a watershed scale.
2. Watershed planning by the locality has identified water quality restoration and preservation priorities.
3. The proposed compensation meets the needs of a watershed plan developed by government agencies and/or non-profit resource planners, in consultation with stake-holders.

Although the VWPP program has not used the term "watershed approach" in regulation, the VWPP program has historically used watershed approach concepts in practice. VWPP staff should continue to support a watershed approach, but should follow the preference hierarchy for the reasons presented in Section IV of this guidance memorandum.

The watershed approach under the Rule requires a structured consideration of watershed needs and how wetlands and other types of aquatic resources in specific locations will address those needs (preamble, FR page 19630). The Rule describes what is needed for a sufficient watershed plan in §332.3(c)(2)(i)-(v). It describes the information needed to use a watershed approach in the absence of a watershed plan in §332.3(c)(3)(i)–(iii). The Rule gives USACE staff the authority to determine if a watershed plan is appropriate.

[12] 73 Fed. Reg. 19673 (April 10, 2008)

When an applicant proposes permittee-responsible mitigation using a watershed approach, VWPP staff should consider whether a watershed approach is applicable. Factors to consider include but are not limited to:

1. Is there adequate information currently available on watershed conditions and needs?
   a. If there is a watershed plan, is it appropriate for wetland mitigation planning or is it ideally used for some other purpose such as stormwater planning?
   b. Is this in an area where watershed boundaries are unclear or do not exist (e.g. coastal areas) and therefore a watershed approach is not relevant?
   c. Does the watershed approach account for geographic ecosystem type even within the watershed? For example, it should require impacts in coastal, non-tidal waters to be compensated for in coastal, non-tidal waters.
2. Do in-house resources (e.g. mapping, threatened and endangered species databases, aerial photographs) provide additional watershed or site-specific data? For example, where an impact site has Mabee's salamander (a state-listed threatened species) habitat and an applicant proposes in-kind/off-site mitigation within the watershed where the compensation site provides Mabee's salamander habitat, the off-site mitigation option can be given preference.
3. Is the scope of analysis adequate? The scope of analysis should be commensurate with the level of impact. When determining the scale of the watershed analysis, staff should consider factors such as aquatic habitat diversity, habitat connectivity, relationships to hydrological sources (including availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses.

VIII. Conclusion

The VWPP Regulation and the Rule share the common objective of supporting ecologically preferable compensatory mitigation options to meet no net loss of aquatic resource function. However, until it can be updated, the VWPP Regulation expresses a preference for on-site/in-kind compensatory mitigation. VWPP staff should follow the Rule and cite the Rule and this guidance as justification when accepting compensatory mitigation packages, which follow the Rule's preference hierarchy. VWPP staff must continue to work with the USACE to overcome differing agency objectives and accept unified compensatory mitigation packages in cases where the compensation package differs from the Rule.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D
DIRECTOR

P.O.BOX 1105 **Richmond, VA 23218**

Subject: Water Guidance Memo No. 08-2012
Farm Pond or Impoundment and Stock Pond or Impoundment Exemption from Virginia Water Protection Program Requirements

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: October 1, 2008

Copies: James Golden, Rick Weeks, Regional VWP Managers, Regional Water Permit Managers, VWPP Staff, Enforcement Staff/Division

Summary:
This guidance provides Virginia Water Protection (VWP) Permit Program staff with information on a 2008 Virginia General Assembly action that changed the Code of Virginia (see §62.1-44.15:21 H) to exempt certain agricultural and silvicultural ponds and impoundments from VWP permit requirements. This guidance also clarifies how applications for these certain activities should be evaluated and processed relative to water withdrawal permitting and permit actions by the U.S. Army Corps of Engineers (USACE).

This guidance supersedes DEQ Guidance Memorandum GM02-2011: *Clarification of Farm or Stock Pond Exemption from Virginia Water Protection Permit Program Requirements.*

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov.

Contact information:

Please contact David L. Davis, Director, Office of Wetlands and Water Protection at (804) 698-4105 or at dldavis@deq.virginia.gov with any questions about the interpretation of this guidance.

Disclaimer:

Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures (*See* Va. Code § 2.2-4001). Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. However, this document does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

FARM POND AND IMPOUNDMENT AND STOCK POND AND IMPOUNDMENT EXCLUSION FROM VIRGINIA WATER PROTECTION PERMIT PROGRAM REQUIREMENTS

I. Purpose

The purpose of this guidance memorandum is to identify a change in the Virginia Code (see §62.1-44.15:21 H), which exempts certain agricultural and silvicultural ponds and impoundments from VWP permit requirements, and to provide DEQ staff with guidance on implementation of the change.

II. Background and Authority

The State Water Control Law (§62.1-44.20 *et seq*.) and the VWP Permit Regulation (9 VAC 25-210-10 *et seq*.) regulate activities such as land clearing, dredging, filling, excavating, draining, or ditching in open water, streams, and wetlands in the Commonwealth of Virginia; and also identify activities that are exempt from the VWP regulation.

Section 9 VAC 25-210-60 A of the VWP Regulation details activities that do not require a VWP permit. Two of those exempt activities include the following:

> "8. Normal agriculture and silviculture activities in a wetland such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices."

> "10. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion."

For a full listing of exempt activities, refer to 9 VAC 25-210-60 A.

In the 2008 Virginia General Assembly, House Bill 211 was signed by the Governor into law. It clarifies number 10 cited above in 9 VAC 25-210-60 A by defining which farm or stock ponds are exempt. The Code of Virginia § 62.1-44.15:21 H, which was enacted by HB211, states:

> "No Virginia Water Protection Permit shall be required for impacts caused by the construction or maintenance of farm or stock ponds, but other permits may be required pursuant to state and federal law. For purposes of this exclusion, farm or stock ponds shall include all ponds and impoundments that do not fall under the authority of the Virginia Soil and Water Conservation Board pursuant to Article 2

(§ 10.1-604 et seq.) of Chapter 6 pursuant to normal agricultural or silvicultural activities."

For the purposes of this guidance, § 62.1-44.15:21 H is referred to as "the 2008 code exclusion."

§ 10.1-604 is cited in the 2008 code exclusion and it states that, "dams operated primarily for agricultural purposes which are less than twenty-five feet in height or which create a maximum impoundment capacity smaller than 100 acre-feet" do not fall under the definition of impounding structure and therefore do not fall under the authority of the Virginia Soil and Water Conservation Board Virginia Impounding Structure (Dam Safety) Regulations. Therefore, under the 2008 code exclusion the construction or maintenance of farm or stock ponds or impoundments is exempt from the VWP Permit Program if the activity meets the purpose and size such that it is exempt under § 10.1-604.

III. Definitions

Acre-foot: a unit of volume equal to 43,560 cubic feet or 325,853 gallons (one foot of depth over one acre of area) (4 VAC 50-20-30).

Agricultural operation: means any operation devoted to the bona fide production of crops, or animals, or fowl, including but not limited to the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery and floral products; and the production and harvest of products from silviculture activity (§ 3.2-300).

Agricultural purpose dams: impounding structures which are less than 25 feet in height or which create a maximum impoundment smaller than 100 acre-feet and operated primarily for agricultural purposes (4 VAC 50-20-30).

Height: means the structural height of an impounding structure. If the impounding structure spans a stream or watercourse, height means the vertical distance from the natural bed of the stream or watercourse measured at the downstream toe of the impounding structure to the top of the impounding structure. If the impounding structure does not span a stream or watercourse, height means the vertical distance from the lowest elevation of the outside limit of the barrier to the top of the impounding structure (4 VAC 50-20-30).

Impoundment: a structure, regardless of its size or intended use, to gather and store surface water that captures the flow of, and is constructed in the channel of, a permanent or intermittent stream (GM #01-2012).

Intermittent stream: a waterway that contains flowing water at times during a typical year when groundwater provides water for the stream flow, but does not contain water at

all times, particularly during dry periods. These streams are likely to have an active aquatic community for at least part of the average year (GM #01-2012).

Maximum impounding capacity: means the volume in acre-feet that is capable of being impounded at the top of the impounding structure (4 VAC 50-20-30).

Normal agricultural activities: means those activities defined as an agricultural operation in §3.1-22.29 [recodified to § 3.2-300] of the Virginia Code and any activity that is conducted as part of or in furtherance of such agricultural operation, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC §1344 or any regulations promulgated pursuant thereto (9 VAC 25-210-10).

Normal silvicultural activities: means any silvicultural activity as defined in §10.1-1181.1 of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such silvicultural activity, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC §1344 or any regulations promulgated pursuant thereto (9 VAC 25-210-10).

Permanent (Perennial) stream: a waterway that contains water at all times during a typical year and that has, or could have, a well established aquatic community (GM #01-2012).

Pond: a structure to gather and store surface water that may or may not be constructed to include the channel of ephemeral streams. A pond does not capture the flow of and does not include the channel of a permanent or intermittent stream (GM #01-2012).

Silvicultural activity: means any forest management activity, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation (§ 10.1-1181.1).

IV. VWP Policy Regarding the Regulation of Ponds and Impoundments

Prior to the 2008 code exclusion, the construction or maintenance of farm and stock ponds used for agricultural or silvicultural purposes was exempt from VWP permitting. The construction or maintenance activities were exempt when the farm or stock pond met DEQ's guidance definition of a pond.

Effective July 1, 2008 the Virginia Code allows for the construction or maintenance of farm or stock ponds ***and*** certain farm or stock *impoundments* without a VWP permit. To be excluded from VWP permit requirements, a farm or stock pond or impoundment must:

- be constructed or maintained primarily for normal agricultural or silvicultural activities, ***and***
- be exempt from Dam Safety Regulations, because it has

- a dam height less than 25 feet ***or***
- a maximum impoundment capacity smaller than 100 acre-feet.

Pursuant to 9 VAC 25-210-60 A 7 b and consistent with Dam Safety Regulations (4 VAC 50-20-20 *et seq*.), should the land use or owner change, the impounding structure and surface water activity may be subject to VWP regulations. The 2008 code exclusion only applies to those agricultural and silvicultural ponds or impoundments that are exempt from Dam Safety Regulations. If the land use or owner change and/or the structure is no longer exempt from Dam Safety Regulations, VWP staff can consider the impacts cumulatively in the event the dam owner applies for additional surface water impacts.

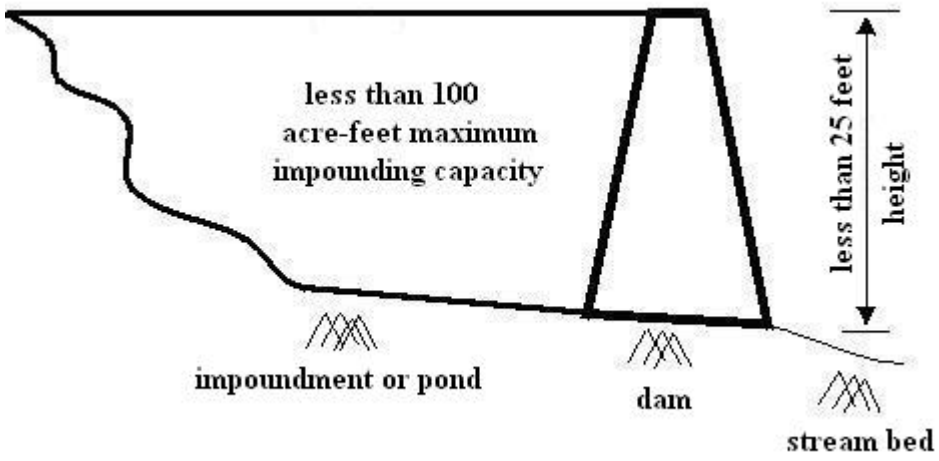


Figure 1. Physical characteristics of an agricultural or silvicultural impoundment exempt from VWP regulations.

V. Water Withdrawal

Under the 2008 code exclusion, the construction or maintenance of farm or stock ponds and certain farm or stock impoundments is allowed without a VWP permit. Water withdrawal from these surface waters is still subject to VWP requirements. Any water withdrawal proposal must still be evaluated for water withdrawal impacts, and a determination must be made as to whether any of the water withdrawal activities are exempt under 9 VAC 25-210-60 B apply. See section 9 VAC 25-210-60 B for surface water withdrawal activities which are exempt.

If one or more of the exempt water withdrawal activities applies, then:

- No VWP permit is required for the withdrawal of water.
- Other state or federal permits may still be required, as noted in the opening paragraphs of 9 VAC 25-210-60 A and -60 B.
- Pursuant to 9 VAC 25-210-60 C, the DEQ may require any owner or operator of a withdrawal system exempt from the VWP permit requirements by subdivisions

B3 through B15 of 9 VAC 25-210-60 to cease withdrawals and file an application and receive a permit prior to resuming any withdrawal under certain circumstances.

VI. Section 401 Certification for the U.S. Army Corps of Engineers Permits

While the 2008 code exclusion provides clarity as to which ponds and impoundments are exempt from VWP regulation, other permits may still be required pursuant to state and federal law. The U.S. Army Corps of Engineers (USACE) has a number of Section 404 permitting mechanisms to provide federal authorization of these VWP-exempt impoundments. The USACE is required by Section 401 of the Clean Water Act to obtain 401 certification or a 401 waiver by the relevant state for any federal permit action to be valid.

Where a VWP-exempt pond or impoundment is covered by a USACE general permit such as a nationwide permit or regional permit,

- If DEQ has certified the USACE general permit, and the water withdrawal conditions of the 401 certification are met,
    - DEQ's 401 certification of the USACE general permit suffices and no further action is required under the VWP permit program provided.
- If DEQ has certified the USACE general permit, and the water withdrawal conditions of 401 certification are *not* met,
    - DEQ staff should evaluate the project for a water withdrawal permit.
- If DEQ has not certified the USACE general permit,
    - DEQ staff will need to send a letter to the USACE permit manager stating that DEQ's Section 401 certification is waived for the proposed construction and maintenance.
    - DEQ staff should evaluate the project for a water withdrawal permit.

Where an excluded pond or impoundment project requires a USACE individual permit,

- DEQ staff will need to send a letter to the USACE permit manager stating that DEQ's Section 401 certification is waived for the proposed construction and maintenance.
- DEQ staff should evaluate the project for a water withdrawal permit.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 1105, Richmond, Virginia 23218
TDD (804) 698-4021
www.deq.virginia.gov

L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4000
1-800-592-5482

August 12, 2008

Mr. J. Robert Hume
U. S. Army Corps of Engineers
Regulatory Branch
Norfolk District, Fort Norfolk
803 Front Street
Norfolk, Virginia 23510-1096

RE: Final Section 401 Water Quality Certification of Norfolk District RP-15, RP-17, RP-18, RP-19, RP-22, RP-40, LOP-1 and LOP-2

Dear Mr. Hume: Bob

On April 1, 2008 the U.S. Army Corps of Engineers (USACE) Norfolk District published a notice of their proposed reissuance and modification of several Norfolk District Regional Permits and Letters of Permission. The following Regional Permits and Letters of Permission were reissued on August 14, 2003 with an expiration date of August 14, 2008: RP-15, RP-17, RP-18, RP-19, RP-22, RP-40, LOP-1 and LOP-2.

The State Water Control Board hereby provides unconditional §401 Water Quality Certification for the following Norfolk District Regional Permits as meeting the requirements of the Virginia Water Protection Permit Regulation, which serves as the Commonwealth's §401 Water Quality Certification:

RP-15: Maintenance of Certain Ditches
RP-17: Private Piers and Mooring Piles
RP-18: Private Piers not covered by RP-17
RP-19: Certain Activities covered by VMRC and/or Local Wetland Boards
RP-22: Installation of Certain Structures in Lake Gaston
RP-40: Minor Maintenance Dredging in Non-tidal Waters
LOP-2: Letter of Permission for Certain Navigationally-related Recreational and Commercial Dredging Projects

With regard to the LOP-1 Letter of Permission for Virginia Department of Transportation projects, the State Water Control Board will continue to process applications for individual §401 Certification through a Virginia Water Protection General or Individual Permit pursuant to 9VAC25-210-10 et seq., with the following exception as noted in 9VAC25-210-220 B:

> "The board may waive the requirement for a VWP individual permit when the proposed activity qualifies for a permit issued by the USACE and receives a permit from the VMRC, pursuant to Chapter 12 (Section 28.2-1200 et seq.) or Chapter 13 (Section 28.2-1200 et seq.) of Title 28.2 of the Code of Virginia, and the activity does not impact instream flows."

Pursuant to our Virginia Water Protection Permit Regulation 9VAC25-210-130 H, the State Water Control Board is issuing this final §401 Certification as meeting the requirements of the VWP regulation and after having advertised and accepted public comment for 30 days on our intent to provide certification. We note that no public comments on our proposed certification were received by this office.

Thank you for your continuing cooperation in the administration of the Joint Permit Program.

Very truly yours,

David L. Davis
Director, Office of Wetlands and Water Protection

cc: VWP Managers

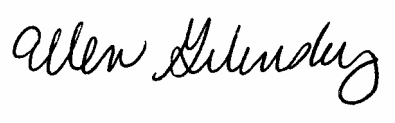
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.
DIRECTOR

P.O.BOX 1105 **Richmond, VA 23218**

SUBJECT: Guidance Memo No. 08-2011
Permitting Dam Maintenance Activities in Surface Waters

TO: Regional Directors

FROM: Ellen Gilinsky, Ph.D., Director 

DATE: July 30, 2008

COPIES: Deputy Regional Directors, VWP Permit Managers, David Davis

Summary:

The Virginia Code requires dams and a corresponding 25-foot buffer area to be free of trees and woody vegetation (See § 10.1-609.2. Prohibited Vegetation). Vegetation removal and grubbing activities in surface waters, including wetlands, fall under the regulatory authority of the Virginia Water Protection (VWP) Permit Program. This guidance provides a framework for consistent VWP permitting and compensatory mitigation of impacts to surface water, including wetlands, resulting from dam vegetative maintenance activities.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov.

Contact information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Permitting Woody Vegetation Removal and Grubbing in Surface Waters for Dam Maintenance

I. Background:

The Virginia Dam Safety Act, §10.1-609.2 entitled Prohibited Vegetation, prohibits the growth of trees and other woody vegetation on the slopes and crest of embankments and the emergency spillway area of a dam, and within a distance of 25 feet from the toe of the embankment and abutments and requires the dam owner to remove any such vegetation in these areas.

Vegetation removal and grubbing activities in surface waters, including wetlands, fall under the regulatory authority of the VWP Permit Program. The VWP Permit Program does not require a permit for maintenance of dikes or dams (see 9VAC25- 210- 60. Exclusions.); however, the current VWP Permit Program Regulation does not specifically address vegetation maintenance near dams or other impounding structures. To maintain consistency between DEQ water protection regulations and the Virginia Soil and Water Conservation Board (SW Board) Impounding Structure Regulations, this guidance defines the serviceable structure of a dam and compensatory mitigation requirements for surface water impacts where dam vegetative maintenance is performed. Compensatory mitigation described in this guidance applies to any impounding structure, or dam, regardless of height or capacity**.**

II. Authority:

The Dam Safety Act in the Code of Virginia states: § 10.1-609.2. Prohibited Vegetation.

Dam owners shall not permit the growth of trees and other woody vegetation and shall remove any such vegetation from the slopes and crest of embankments and the emergency spillway area, and within a distance of 25 feet from the toe of the embankment and abutments of the dam. Owners failing to maintain their dam in accordance with this section shall be subject to enforcement pursuant to § 10.1-613. (2006, c. 30.)

§62.1-44.15:20-23 of the Code of Virginia authorizes DEQ to issue VWP permits for impacts to surface waters, including wetlands, and §9 VAC 25-210-10 *et seq.* is the regulation that implements the VWP Permit Program.

The full Virginia Impounding Structure (Dam Safety) guide is located at:
http://www.dcr.virginia.gov/dam_safety_and_floodplains/documents/dsregs030804.pdf

Pursuant to Virginia Code §62.1-44.15:20, activities requiring a VWP permit include dredging, filling, or discharging any pollutant into or adjacent to surface waters, or otherwise altering the physical, chemical or biological properties of surface waters, excavating in wetlands, or on or after October 1, 2001, conducting the following in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions
2. Filling or dumping
3. Permanent flooding or impounding
4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

VWP Permit Program Regulation Section 9 VAC25-210-60 excludes dam maintenance from VWP permit requirements:

> *8. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation and utility structures. Maintenance does not include modifications that change the character, scope, or size of the original design. In order to qualify for this exclusion, emergency reconstruction must occur within a reasonable period of time after damage occurs.*

III. Definitions:

"Impounding structure" means a man-made structure, whether a dam across a watercourse or other structure outside a watercourse, used or to be used to retain or store waters or other materials (Adapted from 4VAC50-20-30).

"Permanent impacts" are those impacts to surface waters, including wetlands that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters or of the functions and values of a wetland (9 VAC25-210-10).

“Required Vegetative Maintenance Area (RVMA)” means an area mandated by the Dam Safety Act in the Code of Virginia (§ 10.1-609.2. Prohibited Vegetation.) to be clear of woody vegetation, including the slopes and crest of embankments and the emergency spillway area, and within a distance of 25 feet from the toe of the embankment and abutments of an existing impounding structure.

“Significant alteration or degradation of existing wetland acreage or function” means human-induced activities that cause either a diminution of areal extent of the existing wetland or cause a change in wetland community type resulting in the loss of more than minimal degradation of its existing ecological functions (9 VAC25-210-10).

“State waters” means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands (9 VAC25-210-10).

“Surface waters” means all state waters that are not ground water as defined in §62.1-255 of the Code of Virginia (9 VAC25-210-10).

"Temporary impacts" means those impacts to surface waters, including wetlands, that do not cause a permanent alteration of the physical, chemical or biological properties of the surface water or of the functions and values of a wetland. Temporary impacts include activities in which the ground is restored to its preconstruction contours and elevations, such that previous functions and values are restored (9 VAC25-210-10).

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas (9VAC25-210-10).

IV. Permitting Dam Maintenance Activities in Surface Waters:

In the interest of public safety and to encourage protection of communities downstream, VWP staff will not require compensatory mitigation for permanent wetland conversion within the RVMA for vegetative maintenance of dams. VWP staff should consider the RVMA part of the serviceable structure of a dam and therefore should exclude the dam and RVMA from VWP requirements under 9VAC25- 210-60. Mitigation is required for permanent wetland conversion beyond the RVMA.

V. Avoidance & Minimization of Impacts during Dam Maintenance Activities

For dam maintenance activities, avoidance and minimization measures must be employed to the maximum extent practicable. Erosion and sedimentation control measures, such as silt fences, seeding or other ground stabilization, shall be designed in accordance with the most recent edition of the Virginia Erosion and Sediment Control Handbook and applicable ordinances. Heavy equipment in surface waters, including wetlands, must tread over mats, geotextile fabric, or other similar materials to minimize disruption of aquatic life and disturbance to substrate.

All areas exposed by vegetation removal and operations must be stabilized consistent with the most recent edition of the Virginia Erosion and Sediment Control Handbook and applicable ordinances.

Areas of temporary disturbance beyond the RVMA for equipment access, staging or other similar activities must be restored to their pre-existing condition. Achieving pre-existing conditions may require seeding, grading ruts, and grading to pre-existing contours. Planting or seeding with appropriate wetland vegetation according to cover type (emergent, scrub/shrub, or forested) will be required, except when at the discretion of DEQ the applicant demonstrates the need to modify the vegetation type for future maintenance access.

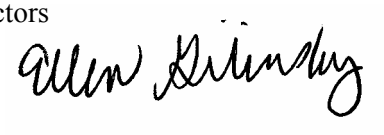
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.,
DIRECTOR

P.O. Box 1105 Richmond, VA 23218

SUBJECT: Guidance Memo No. 08-2009
Use of Preservation for Compensatory Mitigation in VWP Permits

TO: Regional Directors

FROM: Ellen Gilinsky 

DATE: June 9, 2008

COPIES: Deputy Regional Directors, Regional VWP Managers, Regional Water Permit Managers, James Golden, Rick Weeks, Central Office VWPP Staff

Summary:

The purpose of this guidance document is to assist VWP Permit Program staff in assessing whether preservation is an appropriate component of a compensatory mitigation plan and to provide a basis for consistent mitigation crediting of approved preservation proposals. This guidance is intended to supplement DEQ Guidance Memorandum 00-2003, "Wetland Compensation Ratios".

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET and for the general public on DEQ's website at: http://www.deq.virginia.gov

Contact information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Purpose

The purpose of this guidance document is to assist staff in assessing under what circumstances preservation is an appropriate component of a compensatory mitigation plan for mitigating adverse impacts to aquatic resources and to provide a basis for consistent mitigation crediting of approved preservation proposals.

II. Authority

State Water Control Law (§62.1-44.15 *et seq.*) and the Virginia Water Protection (VWP) Permit Regulation (9 VAC 25-210 *et seq.*) require that VWP permits contain requirements for compensating permitted surface water impacts, including wetlands. Specifically, State Water Control Law (§62.1-44.15:21.B.) and VWP Permit Regulation (9 VAC 25-210-116) recognizes preservation of upland buffers adjacent to wetlands or other state waters and preservation of wetlands as an acceptable form of compensatory mitigation, when utilized in conjunction with [wetland] creation, restoration, or mitigation bank credits *and* when consistent with the no net loss for wetland acreage and function statutory and regulatory requirement. For streams, VWP Permit Regulation (9 VAC 25-210-116.C.3) recognizes preservation of riparian buffer as an option for stream compensation, when it is consistent with the regulatory requirement for no net loss of stream function (9 VAC 25-210-116.A).

III. Definitions

"Adjacent" means bordering, contiguous or neighboring; wetlands separated from other surface water by man-made dikes or barriers, natural river berms, sand dunes and the like are adjacent wetlands (9 VAC25-210-0).

"Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment (9 VAC25-210-0).

"Compensation" or "compensatory mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource (9 VAC25-210-0).

"Creation" means the establishment of a wetland or other aquatic resource where one did not formerly exist (9 VAC25-210-0).

"Ecologically preferable" means capable of providing a higher likelihood of replacing existing wetland or stream functions and values, water quality and fish and wildlife resources than alternative proposals (9 VAC25-210-0).

“Enhancement" means activities conducted in existing wetlands or other portions of the aquatic environment that increase one or more aquatic functions or values (9 VAC25-210-0).

“Function” means the physical, chemical, and biological processes that occur in ecosystems (33 CFR 322.2).

"Impacts" means results caused by human-induced activities conducted in surface waters, as specified in §62.1-44.15:20 A of the Code of Virginia (9 VAC25-210-0).

"Impairment" means the damage, loss or degradation of the functions and values of state waters (9 VAC25-210-0).

"In-lieu fee fund" means a monetary fund operated by a nonprofit organization or governmental agency which receives financial contributions from persons impacting wetlands or streams pursuant to an authorized permitted activity and which expends the moneys received to provide consolidated compensatory mitigation for permitted wetland or stream impacts (9 VAC25-210-0).

"Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation (9 VAC25-210-0).

"Mitigation" means sequentially avoiding and minimizing impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action (9 VAC25-210-0).

"Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of mitigation banks, and is operating under a signed banking agreement (9 VAC25-210-0).

"Out-of-kind mitigation" means compensatory mitigation that does not replace the same type of wetland or surface water as was impacted, but does replace lost wetland or surface water functions, values, or beneficial uses (9 VAC25-210-0).

"Practicable" means available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes (9 VAC25-210-0).

"Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms (9 VAC25-210-0).

"Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered or degraded stream

corridor, including adjacent areas and floodplains, to its natural conditions (9 VAC25-210-0).

"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions (9 VAC25-210-0).

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands (9 VAC25-210-0).

"Surface water" means all state waters that are not ground water as defined in §62.1-255 of the Code of Virginia (9 VAC25-210-0).

"USM (Unified Stream Method)" is a method to rapidly assess what the stream compensation requirements would be for permitted stream impacts and the amount of "credits" obtainable through implementation of various stream compensation practices (Source: USM Manual).[1]

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas (9 VAC25-210-0).

IV. Use of Preservation as Compensatory Mitigation

A. Under what circumstances is preservation appropriate to use as compensatory mitigation for permitted impacts?

DEQ staff shall evaluate the suitability of preservation as part of a compensatory mitigation plan on a case by case basis when determining whether other practicable and ecologically preferable compensations alternatives exist. Prior to determining how much mitigation credit should be given for any proposed preservation, the first consideration must be whether the proposed preservation is appropriate for compensatory mitigation.

In order to be an appropriate component of a compensatory mitigation plan for **wetland impacts**, the proposed preservation first must:

[1] The Unified Stream Methodology (USM) is a collaborative effort between the U.S. Army Corps of Engineers, Norfolk District (COE) and the Virginia Department of Environmental Quality (DEQ). The most recent version of the USM Manural may be viewed on the Department of Environmental Quality Webpage at: http://www.deq.virginia.gov/wetlands/mitigate.html

1) be utilized in conjunction with creation, restoration or mitigation bank credits as appropriate to prevent a net loss of wetland acreage; (See §62.1-44:15.21 and 9 VAC 25-210-116); and

2) be sufficient to achieve no net loss of wetland functions (See §62.1-44:15.21 and 9 VAC 25-210-116).

State Water Control Law and the VWP Permit Regulation indicate that preservation as mitigation for wetland impacts must be utilized in conjunction with creation, restoration or the purchase of mitigation bank credits. Any proposed compensatory mitigation package must be sufficient to ensure no net loss of wetland acreage; therefore wetlands must first be compensated at a minimum of a 1:1 ratio using creation, restoration or the purchase of mitigation bank credits before preservation can be considered. Preservation may then be used to provide additional mitigation to bring the total mitigation package to the overall ratio required to mitigate adverse impacts to aquatic resource functions and acreage (i.e., 2:1, 1.5:1, etc.).

In order to be an appropriate component of a compensatory mitigation plan for **stream impacts**, the proposed preservation must achieve no net loss of stream function (see 9 VAC 25-210-116.A). The USM should be used to determine the stream compensation requirement for the permitted stream impact and the amount of "credits" obtainable through implementation of various stream compensation practices. DEQ staff should employ the USM data, combined with best professional judgment, to assure that the compensation plan that includes stream preservation achieves no net loss of stream function. In addition to quantifying stream compensation requirements through the USM, the evaluation criteria in Table 1 below should be considered to determine if preservation is justified. In most cases, preservation of avoided streams is not acceptable unless it meets most of the criteria described in Table 1.

Stream preservation as a sole source of mitigation should only be used for exemplary systems under documentable threat of loss or degradation and when preservation of an exemplary system offsets impacted functions**.** Typically, if a system meets all the criteria described in Table 1, it may be considered exemplary**.** A system that is not considered exemplary may be a good candidate for enhancement or restoration.

In the evaluation of both wetland and stream compensatory mitigation plans that include preservation, DEQ staff should consider the functions and quality of the impact area(s) relative to those of the proposed preservation area(s). Preservation of similarly functioning or ecologically preferable wetlands or streams and/or buffers should be encouraged. When considering a compensatory mitigation plan that includes a preservation component, impact areas and proposed preservation areas should be compared based on the criteria presented in Table 1.

Table 1. Criteria describing best candidates for preservation. Typically, exemplary systems meet all the criteria.

Preservation Proposed	Evaluation Criteria
Wetlands or streams	• documented presence of Threatened or Endangered species, Species of Greatest Conservation Need (classified as Tier 1 or 2, or assemblages of Tier 3 and/or 4 species See http://bewildvirginia.org/species/) or areas listed as a Natural Heritage Resource • invasive species absent • system at or near maturity • favorable water quality within the system • the system has an important, positive effect on downstream water quality • documented threat of loss or degradation, such as from development, agriculture, silviculture • preservation requirements are not already in place (such as Resource Protection Areas (RPAs) or other local ordinances) • the preservation plan protects the aquatic system, to the extent possible, against present and potential future adverse effects, such as fill, fragmentation, erosion or sedimentation, litter, stormwater inputs, hydrologic changes, lack of buffer • resources on the subject property are buffered and geographically apart from project development; self-sustaining; buffered from development; and preferably, connected to wetlands off-site • preservation will protect the system from potential future degradation from upstream activities to the extent possible • the preserved site can be legally protected through the recordation of DEQ-approved restrictive instrument in the property's chain of title or a conservation easement held by a state, local, or non-governmental conservation agency, including land trust, and are shown on the associated surveyed property plat • the preserved areas are not within subdivided lots
Upland Buffers	• because of high soil erodibility or steep slopes, the resultant threat to a protected aquatic resource is high if the area were cleared

	• protects the aquatic resource from physical encroachment, erosion • protects water quality appropriately considering the upslope land use • provides wildlife habitat (300 foot is ideal for a wildlife corridor) and connectivity to other protected corridors • threatened by development or other impacts in the present or foreseeable future • preservation requirements are not already in place (such as RPAs or other local ordinances) • width of proposed buffer adequately protects water quality, based on the up-slope land uses, degree of slope, and soil erodibility *For example, where wetlands are associated with flat terrain, large lots, and deed restrictions to limit impervious area, a narrow forested buffer may be acceptable. A wetland associated with a steeper slope, intense development, highly erodible soil, cattle, and/or no restrictions on impervious surface would require a forested buffer of 100 to 200 feet or to the top of the slope.* The value of buffers to water quality decreases as the distance from the resource increases. The applicant is required to demonstrate that any buffer preservation *outside* of 100 feet provides additional protection or enhancements to water quality, fish & wildlife resources or habitat before DEQ gives mitigation credit for these areas or assigns ratios.
Preservation of areas already protected by local ordinances or other laws, regulations, easements, or other types of protective instruments.	Preservation of such areas may be appropriate under certain circumstances if the applicant can successfully demonstrate that the preservation would add new or additional protection or enhancement to water quality, fish and wildlife resources or habitat. Such additional protection or enhancement may include prohibition of the following: silviculture, new utility easements, storm water management facilities, or other activities allowed under current protections. Awarding credit for the preservation of such areas is solely at the discretion of DEQ.
Out-of-kind preservation	DEQ discourages the use of out-of-kind preservation unless the applicant can successfully demonstrate ecological preferability. For example, preservation of high quality palustrine forested wetlands for impacts to low quality palustrine emergent wetlands may be justified due to ecological preferability.

B) When is preservation not appropriate for compensatory mitigation?

Preservation is not appropriate for compensatory mitigation credit when:

1) for wetlands, it is not proposed in conjunction with creation, restoration or mitigation bank credits

2) for wetlands, there will be a net loss of wetland acreage or functions ;

3) for streams, it does not provide no net loss of stream functions;

4) the proposed preservation areas have the potential to significantly degrade over time;

5) the proposed preservation areas were avoided during project design, and thus were counted toward meeting the DEQ mitigation requirement to first avoid and minimize impacts to the maximum extent practicable[2]; or

6) the applicant fails to demonstrate that the proposal meets a majority of the criteria specified in Table 1, above.

While certain types of preservation may not receive compensatory mitigation credit, the permit writer should attempt to work with the applicant to preserve resources through a restrictive instrument to avoid or minimize indirect impacts.

C) How should preservation be credited?

Once DEQ has determined that the proposed preservation is an acceptable form of compensatory mitigation for project impacts, the permit writer must determine the amount of mitigation credit assigned to the proposed preservation. If preservation is proposed to mitigate for any unavoidable adverse stream impacts, crediting should follow the current stream mitigation crediting protocol that has been adopted by DEQ, such as the Unified Stream Methodology. The USM differentiates high quality and low quality streams based on the Reach Condition Index (RCI) determined using the methodology. The USM allows the following preservation ratios for riparian areas:

High Quality Streams: approximately 7:1 for inner 100 feet of buffer
Low Quality Streams: approximately 14:1 for inner 100 feet of buffer.

Wetland mitigation credit should be consistent with the recommendations presented in Table 2.

[2] At its discretion DEQ may approve an avoided preservation area for compensation if the area is buffered, geographically apart from the project development; self-sustaining; and preferably, connected to wetlands off-site.

Table 2. Determining wetland mitigation ratios where preservation is part of the overall compensatory mitigation package.[3]

Preserved Area	Credit Ratio
Wetlands	Typically 10:1 to 15:1, depending on the value of the wetland area being preserved. In special circumstances, credit as high as 5:1 may be given, for example, when documented threatened and endangered species or heritage resources exist.
Upland buffers	15:1 to 20:1, with the greater credit being given for areas where there is an additional benefit, such as the documented presence of Threatened or Endangered species, or Species of Greatest Conservation Need.[4]
Areas under existing legal protection	These areas should only be considered appropriate if the preservation would add additional, new protection or enhancement to water quality, fish & wildlife resources or habitat. Since the areas are already protected, credit should be less than that allowed for preservation of a similar unprotected resource. Credit given will be dependent upon the additional level of protection or enhancement provided, but generally will be at ratios no less than 15:1. For example, 15 acres or more of wetland preservation would be required for every acre of wetland impacted.
Off-site preservation	Off-site preservation should be evaluated like on-site preservation. An off-site area may be ecologically preferable to an on-site area.
Out-of-kind preservation	DEQ generally discourages out-of-kind preservation. (i.e., palustrine emergent for palustrine forest or palustrine scrub-shrub wetlands for palustrine forest) unless the applicant can successfully demonstrate ecological preferability. In the event out-of-kind preservation is approved, the ratio will be determined on a case-by-case basis.

[3] For all sources of compensatory mitigation, the amount of required compensation must be sufficient to replace lost aquatic resource functions. Other factors to be considered when determining the appropriate amount of compensatory mitigation to offset permitted impacts are: The method of compensatory mitigation (i.e., restoration, establishment, enhancement, preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site.

[4] Be Wild, Virginia. "Species of Greatest Conservation Need". http://bewildvirginia.org/species/.

D) Preservation Instruments

In order for an area to be acceptable as compensation, it must be preserved in perpetuity via recordation of a restrictive instrument or conservation easement in the property's chain of title. The restrictive instrument must contain standard language from the DEQ sample restrictive instrument document. Alternative language may be acceptable but will require review by DEQ Central Office VWP and enforcement staff. Recording the preserved areas on the associated surveyed plat is also recommended.

For properties located on State or Federal lands where encumbering the land is prohibited, alternative methods for meeting the "preservation in perpetuity" requirements can be considered, such as having the entity incorporate the land and associated prohibitions into their Integrated Natural Resources Management Plan (INRMP) or similar instrument

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

ELLEN GILINSKY, Ph.D.
DIRECTOR

P.O.BOX 1105 **Richmond, VA 23218**

Subject: Guidance Memo 08-2008
Investigating and Coordinating Complaints Related to Discharges of Sediment from Construction Sites.

To: Regional Directors

From: Ellen Gilinsky

Date: June 9, 2008

Copies: Rick Weeks, James Golden, Deputy Regional Directors, Regional VWP Managers, VWPP Staff

Summary:

The Virginia Department of Conservation and Recreation (DCR) regulates discharges of stormwater from construction sites, while the Virginia Department of Environmental Quality (DEQ) regulates dredge, fill, or discharge of any pollutant into, or adjacent to surface waters, including wetlands. DCR and DEQ routinely receive complaints and make observations related to discharges of sediment from construction sites. Regulation of such discharges may fall within the jurisdiction of either or both agencies, depending on the facts. For this reason, this guidance memorandum explains how DEQ and DCR have agreed to coordinate addressing these kinds of complaints.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov.

Contact information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

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Investigating and Coordinating Suspected Discharges of Sediment from Construction Sites

I. Introduction: The DCR and the DEQ routinely receive complaints and make observations related to discharges of sediment from construction sites. Regulation of such discharges may fall within the jurisdiction of either or both agencies, depending on the facts. For this reason, this guidance memorandum explains how DEQ and DCR have agreed to coordinate addressing these kinds of complaints

II. Background: Sediment discharges to streams, wetlands, and waters can have a detrimental impact to aquatic biota, water quality, and the physical integrity of the impacted resource. DCR is obliged by statute to investigate every complaint it receives regarding discharges of sediment from construction sites in the state of Virginia.

III. Authority: DCR regulates discharges of stormwater from construction sites pursuant to the Virginia Stormwater Management Act, Virginia Code § 10.1-603.2 *et seq*., and the Virginia Stormwater Management (VSMP) Program Permit Regulations 4 VAC 50-60-10 *et seq*.

Pursuant to Virginia Code § 10.1-603.2.2, it shall be unlawfull to cause a stormwater discharge from a land-disturbing activity except in compliance with a permit issued by a permit issuing authority. The Virginia Stormwater Management Program (VSMP) General Permit for Discharges of Stormwater from Construction Activities , codified at 4 VAC 50-60-1170, provides that stormwater discharges which the permit-issuing authority determines cause, or may reasonably cause, or contribute to a violation of water quality standards are not covered by the permit. (4 VAC 50-60-1130.A.4)

DEQ administers the Virginia Water Protection Permit (VWPP) Program, which regulates impacts to state waters, including wetlands. This permit program also serves as Virginia's Section 401 certification program for federal Section 404 permits under the Clean Water Act.

Under the authority of the Code of Virginia, regulated impacts to state waters are described as follows (See §§62.1-44.15 and 62.1-44.15:5, 9VAC25-210-50 *Prohibitions and requirements for VWP permits)*:

Except in compliance with a VWP permit, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters, withdraw surface water, otherwise alter the physical, chemical, or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands on or after October 1, 2001, conduct the following activities in a wetland:

1. *New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;*
2. *Filling or dumping;*
3. *Permanent flooding or impounding; or*
4. *New activities that cause significant alteration or degradation of existing wetland acreage or functions.*

IV. Definitions:

"State waters" mean all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

"Surface waters" mean all state waters that are not ground water as defined in §62.1-255 of the Code of Virginia.

V. Interagency Coordination of Discharges of Sediment From Construction Sites :

The Agency receiving the complaint shall investigate and determine if coordination between agencies is necessary. Staff will either receive a complaint or personally make an observation of possible discharge from a construction site. Next, staff will make a preliminary evaluation either by further questioning the complainant or through additional on-site investigation. Under circumstances where DCR staff conducts the initial investigation, DCR will coordinate with designated DEQ staff if there is reason to suspect discharge of sediment to surface waters, including wetlands. Under circumstances where DEQ staff conducts the initial investigation, DEQ will coordinate with designated DCR staff if there is reason to suspect discharge of sediment from a construction site. Typically, coordination will involve contacting the designated field staff, discussing the facts of the case, arranging a joint inspection if necessary, and developing independent corrective action plans, when appropriate. Agency staff will follow up with each other as necessary.

DEQ should contact the regional DCR office using the following link, **http://deqnet/docs/water/Water_permit/VWP_Permit_Program/VWPP_Library/Contacts_and_Resources/DCR_Stormwater_Programs_Staff.pdf).**

DCR should contact the appropriate regional DEQ office. See the following link: **http://www.deq.virginia.gov/export/sites/default/wetlands/pdf/VWP_Permit_Staff.pdf.**

MEMORANDUM OF AGREEMENT
BETWEEN
THE VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION
AND
THE VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
FOR
INVESTIGATING AND COORDINATING COMPLAINTS RELATED TO DISCHARGES OF SEDIMENT FROM CONSTRUCTION SITES

WHEREAS, the Virginia Department of Conservation and Recreation (DCR) and the Virginia Department of Environmental Quality (DEQ) each routinely receive complaints and make observations related to discharges of sediment from construction sites.

WHEREAS, DCR regulates discharges of stormwater from construction sites pursuant to the Virginia Stormwater Management Act, Virginia Code § 10.1-603.2 *et seq*., and the Virginia Stormwater Management (VSMP) Program Permit Regulations 4 VAC 50-60-10 *et seq*.

WHEREAS, pursuant to Virginia Code § 10.1-603.2.2, it shall be unlawful to cause a stormwater discharge from a land-disturbing activity except in compliance with a permit issued by a permit-issuing authority.

WHEREAS, the Virginia Stormwater Management Program (VSMP) General Permit for Discharges of Stormwater from Construction Activities , codified at 4 VAC 50-60-1170, provides that stormwater discharges which the permit-issuing authority determines cause, or may reasonably cause, or contribute to a violation of water quality standards are not covered by the permit. (4 VAC 50-60-1130.A.4).

WHEREAS, DEQ administers the Virginia Water Protection Permit (VWPP) Program codified at 9VAC-25-210, which regulates impacts to state waters, including wetlands.

WHEREAS, pursuant to Virginia Code §§62.1-44. 15 and 62.1-44.15:20, except in compliance with a Virginia Water Protection permit issued by DEQ, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters , otherwise alter the physical, chemical, or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands on or after October 1, 2001.

THEREFORE, it is agreed that DCR and DEQ shall follow the procedure below for addressing complaints or observations related to discharges of sediment from construction sites:

1. The Agency receiving the complaint shall investigate and determine if coordination between agencies is necessary.

2. Under circumstances where DCR staff conducts the initial investigation, DCR will coordinate with designated DEQ staff if there is reason to suspect discharge of sediment to surface waters, including wetlands.

3. Under circumstances where DEQ staff conducts the initial investigation, DEQ will coordinate with designated DCR staff if there is reason to suspect discharge of sediment from a construction site.

This Memorandum of Agreement shall become effective on April 15, 2008, and remain in affect until modified or superseded, or until either of the signatories determines that it no longer serves its agency's needs, and then only after 30 days written notice.

IN WITNESS WHEREOF, the parties sign and cause this MOA to be executed on this the 9th day of June, 2008.

Jack E. Frye 6-17-2008

Jack Frye Date
Division Director,
DCR Division of Soil and Water Conservation
Commonwealth of Virginia,
Department of Conservation and Recreation

Ellen Gilinsky 6/9/08

Ellen Gilinsky Date
Director,
Water Division
Commonwealth of Virginia,
Department of Environmental Quality

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION
ELLEN GILINSKY, Ph.D., DIRECTOR

P.O.BOX 1105 **Richmond, VA 23218**

Subject: Guidance Memorandum No. 08-2004
Regulation of Ditches under the Virginia Water Protection Permit Program

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: May 13, 2008

Copies: James Golden, Rick Weeks, Regional VWP Managers, Regional Water Permit Managers, VWPP Staff

Summary:

The purpose of this guidance is to identify the circumstances under which different types of ditches should be considered a component of state waters and, as such, when these features should be regulated under the VWPP program.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov.

Contact information:

Please contact David L. Davis, Director, Office of Wetlands and Water Protection at (804) 698-4105 or at dldavis@deq.virginia.gov with any questions about the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

REGULATION OF ACTIVITIES IN DITCHES AND ASSOCIATED WATERS

Background:

State Water Control Law (§ 62.1-44.15:21.C) states that "Any delineation accepted by the U.S. Army Corps of Engineers (the Corps) as sufficient for its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland." In addition, according to the MOU between DEQ and the Norfolk Corps, as part of the delineation confirmation the Corps is to indicate what waters may be considered state-only in terms of jurisdiction. A delineation confirmation identifies the limits of surface waters. DEQ has relied on these delineation confirmations in determining the type of surface waters present for a particular project. However, it is DEQ's responsibility to determine jurisdiction over those waters. DEQ has jurisdiction over surface waters of the state. In contrast, DEQ regulates certain activities in those surface waters.

I. Purpose:

The purpose of this guidance is to clarify when activities in ditches are under our statutory authority. Ditches may contain wetlands, uplands, or open water (flowing or non-flowing water). Ditches may be constructed in wetlands or in uplands. In some cases, these ditches are dry most of the year; in others they contain standing or flowing water for lengthy periods of time. In many cases, ditches contain wetlands that satisfy the soil, hydrology, and vegetation criteria contained in the 1987 Corps of Engineers Wetland Delineation Manual.

DEQ has jurisdiction over all surface waters, including wetlands; therefore ditches that contain surface waters are jurisdictional. However, there are certain activities in certain types of jurisdictional waters located in ditches that DEQ may not choose to regulate based on the level of potential risk to water quality and fish and wildlife resources.

Ditches are inherently constructed for a purpose. It is often necessary to periodically maintain the integrity of the ditch in order to maintain that purpose. Because ditches can be constructed in uplands but contain surface waters or may be so integral to a drainage system that the natural aspects of the original surface water are lost, we must consider the need to consistently, and efficiently review proposed impacts to these ditches while protecting Virginia's water quality.

This guidance document will answer the following questions:

1) When are wetlands in ditches jurisdictional for DEQ?
2) What is the difference between a channelized stream and a ditch?
3) What activities in ditches are regulated by DEQ?
4) How does DEQ regulate activities in surface waters that are integral parts of a drainage system?

II. Definitions

For the purposes of VWP jurisdiction, the following definitions apply:

Channelization is defined in VWP regulation as "the alteration of a stream channel by widening, deepening, straightening, cleaning or paving certain areas".

Channelized Stream is defined as a stream that has been widened, deepened, straightened, cleaned or paved. Where streams have been relocated into a ditch, in whole or in part, the ditch is considered a channelized stream and is regulated as a stream.

Ditch is defined as a linear feature excavated for the purpose of draining or directing surface or groundwater. Ditches may also be constructed to collect groundwater or surface water for the purposes of irrigation.

Drainage System is defined as a series of watercourses designed to direct excess water.

Maintenance is defined as activities that return a feature to its original design standards. For example, a maintained ditch does not exceed the average dimensions of the original ditch (no change is the cross-sectional dimensions). Culverting a ditch is not considered maintenance. Maintenance generally includes, but is not limited to, activities such as:

- Excavation of accumulated sediments
- Re-shaping of side slopes
- Stabilization of side slopes
- Armoring, lining, and/or paving where the ditch was previously armored, lined, or paved.

Normal agricultural activities are defined by VWP regulation as those activities defined as an agricultural operation in § 3.1-22.29 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto. Activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices are considered normal agricultural activities.

Open Water Ditch is defined as those ditches that are inundated with surface water for a sufficient period of time during a normal year to develop an Ordinary High Water Mark but that do not contain vegetation during all or part of the year.

Ordinary high water or ordinary high water mark (OHWM) is defined in VWP regulation as "the line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas".

Prior Converted Cropland (PC Cropland) as defined by the Natural Resources Conservation Service (NRCS) are those wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before December 23, 1985, to the extent that they no longer exhibit important wetland values. PC Cropland shall be considered abandoned when it has lain idle so long that modifications to the hydrological regime are necessary to resume operation or if agricultural activities have not occurred on the site within the previous 5 years. A site is not considered abandoned if the land use changes but the site was cropped within the previous 5 years.

State waters are defined in statute and regulation as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands".

Stream is defined as a natural body of flowing water, such as a brook or a river. Streams do not always contain flowing water but contain flowing water for a significant period of time such that the stream has a defined bed and bank and an ordinary high water mark. The ordinary high water mark does not need to be continuously apparent throughout the stream reach.

Stream bed is defined in VWP regulation as "the substrate of a stream, as measured between the ordinary high water marks along a length of stream. The substrate may consist of organic matter, bedrock or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed".

Surface water is defined in statute and regulation as "all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia". Thus, ditches that contain and/or convey surface water are considered state waters.

III. VWPP Program Regulatory Decision Process:

Given the foregoing definitions, the following guidelines should be applied when determining whether a ditch containing wetlands and/or open water is subject to the VWPP regulations. Streams, ditches containing streams, and channelized streams are covered in Section V. Should a project proponent have a question regarding DEQ jurisdiction or if an activity is regulated, DEQ staff can provide a permit determination using the following guidelines.

1. Ditches excavated through wetlands are jurisdictional. Maintenance of existing drainage and irrigation ditches is excluded from regulation. All other activities in the ditch, unless specifically excluded in VWP regulation, are regulated. Therefore, activities in the drainage or irrigation ditches for the purposes of converting the area to another use are regulated (such as filling the ditch to create uplands). DEQ staff will determine, based on the information provided by the applicant and field visits, whether the ditch is vegetated (wetland) or unvegetated (open water) in order to determine compensation requirements.

2. Normal agricultural and silvicultural activities proposed in ditches that are associated with an active agricultural or silvicultural facility, are **not** regulated in accordance with VWP Regulation 9VAC25-210-60. This exemption does not authorize activities in the drainage or irrigation ditches for the purposes of converting the areas to another use. This exemption is not extended to stream impacts unless the activity is specifically excluded in VWP regulation. This exemption does not extend to alterations necessary to convert the property to another use (i.e., residential, commercial).

3. Activities proposed in ditches that are associated with 'prior converted cropland' are **not** regulated in accordance with VWP Regulation 9VAC25-210-60. Since VWP does not regulate PC cropland, the ditches that are a part of the PC cropland designation are not regulated. This exemption is not extended to stream impacts unless the activity is specifically excluded in VWP regulation.

4. Ditches excavated through wetlands and associated with abandoned PC cropland **are** jurisdictional.

5. If a ditch was constructed in an upland **AND** contains wetlands and/or open water, determine if the ditch is connected to another surface water (upstream or downstream):

    a. If a ditch is **not** connected to a surface water (i.e., it is isolated), it is **not** regulated. If the ditch contains wetlands and/or open water but is not connected to another surface water, activities within the ditch are not regulated.

    b. If a ditch **is** connected to a surface water, determine if the activity will affect upstream, downstream, or other surface waters **OR** if the activity will affect a threatened or endangered species. The Corps may identify these ditches as 'jurisdictional ditches' or 'other waters of the US' in their delineation confirmation.

        An example of an activity that is not regulated in ditches that contain wetlands or open water **and** are connected to surface waters is the placement of a properly sized culvert for a driveway or roadway crossing that does not cause flooding upstream or affect downstream hydrology and where proper erosion and sediment controls are in place.

        An example of an activity that is regulated in ditches that contain wetlands or open water **and** are connected to surface waters is the relocation of a ditch that would remove hydrology from a downstream surface water or a portion thereof.

6. Activities in ditches constructed in an upland and that receive water solely from 'artificial' sources are not regulated, even if they contain wetlands or open water. Examples of these ditches include: ditches that drain water applied in greenhouses; ditches that drain a car-wash facility; roadside ditches that convey water solely off of road and surrounding upland areas; and agricultural ditches that convey excess irrigation water from upland fields.

7. Activities in ditches, or any surface water, created during a mining operation that is

permitted by the Department of Mines, Minerals, and Energy (DMME), Division of Mined Land Reclamation (DMLR), are not regulated by DEQ as state waters during the life of the mining permit. However, these same waters do become state waters when the site is no longer under an active DMME permit.

IV. Activities in Ditches that are excluded from VWPP regulation:

There are activities that are excluded from regulation when conducted in ditches containing surface waters (9 VAC 25-210-60). These activities include construction and maintenance of irrigation ditches for agricultural operations, the maintenance of drainage ditches, and fill associated with appurtenant facilities that are functionally related to irrigation ditches. The maintenance dredging of existing ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the designed cross-sectional dimensions of the original ditch. The construction of new drainage ditches is not excluded, nor is the filling of existing ditches in accordance with this guidance. Channelization of streams is expressly not included in this exclusion.

In order for a maintenance activity to be excluded from VWP regulation, a project proponent shall demonstrate that the ditch is included in an existing drainage or irrigation easement, an existing drainage or irrigation system, on an existing drainage or irrigation map, or that the ditch has historically been maintained for the purpose of drainage or irrigation. If they cannot provide this demonstration, a VWP permit may be required to establish the ditch as a drainage or irrigation ditch. Once a ditch is established as a drainage or irrigation ditch, it shall be classified as such for all future maintenance activities. The project proponent must maintain documentation establishing the ditch as a drainage or irrigation ditch and must make this documentation available to DEQ upon request.

V. Streams, Ditches, and Channelized Streams

The VWP regulation makes a distinction between ditches and channelized streams. In many parts of the state, streams have been channelized and used as stormwater conveyances (i.e., streams located along roads that serve as roadside ditches and streams that serve as drainages in certain low-lying localities). These streams may colloquially be called 'ditches' even though they are actually part of the stream network. Streams that have been channelized, relocated, or incorporated into a ditch, wholly or in part, are still considered streams and are regulated as streams. (In other words, when a stream is relocated in whole or in part into a ditch, that ditch is regulated as a stream). However, it may be necessary to maintain the secondary purpose of these features (i.e., drainage).

The proponent of a proposed activity located in a channelized stream or ditch containing a stream shall document that the stream is included in an existing drainage easement, an existing drainage system or map, or that the stream has historically been channelized for this secondary purpose. The VWP Project Manager should consider proposals to maintain the channelized nature of these streams on a case-by-case basis. Factors to be considered include, but are not limited to:

1. Is this a new channelization?

2. Has the channelized stream naturalized (developed stable pattern, dimension, and profile)?
3. Will the activity alter the physical, chemical, or biological nature of the stream?
4. Will the functions and values of the stream be diminished?
5. Will the activity alter the physical, chemical, or biological nature of other waters?
6. Are there rare, threatened, or endangered species (i.e., mussels) that will be affected?
7. Will the activity degrade the stream beyond the level proposed by the activity (i.e. cause new/increased instability due to inappropriate pattern, dimension, and/or profile)?

If the answer to all of these questions is no, no permit is required for the proposed activity. If the answer is yes to one or more of these questions, the VWP Project Manager should consider the type of permit and compensation required for the proposed activity.

New stream channelization is regulated. In other words, streams included in a drainage easement that were never channelized for the purpose of drainage, cannot be considered for maintenance. For example, stormwater from a subdivision is discharged to a stream. That stream is not channelized but carries the stormwater flow to a regional stormwater impoundment. Excavation in that stream is regulated as channelization and requires permit authorization. Channelization of a stream is not considered maintenance.

The following information should be reviewed to determine if a linear feature is a stream or a ditch: topographic maps, aerial photographs, soil surveys, and previous design plans (e.g. VDOT and locality drainage plans). Field observations must also be used to determine if there is a stream channel upstream and/or downstream of the linear feature and if the feature is a channelized stream. The same information should be used in an enforcement case to determine if a feature is a stream.

VI. Compensation:

For permitted activities, compensation is required for impacts greater than 1/10 acre of wetlands and open water and greater than 300 linear feet of stream channel. For ditches containing open water or wetlands, the impacts are calculated in acres. For streams, channelized streams, or ditches containing streams, the impacts are calculated in linear feet. In accordance with VWP Regulation, "compensation for open water impacts may be required, as appropriate, to protect state waters and fish and wildlife resources from significant impairment."

SUBDIVISION RECOMMENDATIONS:

I. Purpose and Need

These subdivision recommendations are based on and update previous procedures for the review of subdivision proposals and treatment of residual aquatic resources within those developments. The objectives of these guidelines are to ensure that:

1) Staff fully considers the potential impacts to aquatic resources posed by a development;
2) A consistent and logical framework is established for considering any residual aquatic resources (wetlands, streams, and open water areas for which impacts are not authorized) as well as upland areas and/or buffer areas within a subdivision;
3) The likelihood of additional and unpermitted impacts to any residual aquatic resource areas within a permitted subdivision is minimized;
4) Any residual aquatic resources within a permitted development retain their integrity and predevelopment functions and values after completion of the development;
5) Cumulative impacts associated with subdivisions are fully considered; and
6) Requirements for future regulatory compliance efforts associated with residual aquatic resources within a development are minimized;

II. Authority

The Norfolk District of the US Army Corps of Engineers (the Corps) issues permits under the authority of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 for regulated activities proposed in waters of the United States, including wetlands, throughout the state of Virginia. The Department of Environmental Quality (DEQ) and its Virginia Water Protection (VWP) Permit Program derives regulatory authority from both the Clean Water Act (§ 401) and the State Water Control Law (SWCL) for regulated activities proposed in surface waters, including wetlands. Virginia Water Protection Permit (VWPP) regulations incorporate, by reference, the mitigation sequencing guidelines from the Clean Water Act, also known as the Section 404(b)(1) guidelines (reference 9 VAC 25-210-115A).

III. Background

In accordance with the §404(b) (1) Guidelines of the Clean Water Act, applicants applying for authorization to impact waters and wetlands within the jurisdiction of DEQ and/or the Corps must demonstrate that impacts to aquatic resources have been avoided and minimized to the maximum extent practicable. As a result there are often residual aquatic resources that have been avoided in the permit process. These areas may be located in close proximity to impacted aquatic resources and are likely located adjacent to land that is permitted for construction.

Due to the nature of residential subdivisions, individual property owners are often not educated about the presence of a deed restriction on portions of their property, the location of aquatic resources remaining on their property, or activities in these areas that require permits or agency approval to conduct. Degradation of residual aquatic resources commonly occurs through landscaping, drainage improvements (complaints about standing water and mosquitoes), placement of fill material, disposal of lawn debris, and rubbish. In some cases, permit conditions requiring the protection of residual aquatic resource within lots conflict with some requirements of local governments. Regulatory agencies have had to expend substantial effort to ensure compliance with restrictive covenants recorded over residual aquatic resources in lots within subdivisions. Subsequently, the regulatory agencies realized the need to prevent future (and often unauthorized) cumulative impacts to these remaining aquatic resources within the proposed development.

In addition, large scale subdivisions are commonly developed in phases and the agencies are asked to provide authorization for portions of the overall project at a given time. The practice of permitting portions of a single and complete project under separate permits is commonly referred to as ‘piece-mealing.’

Commercial developments, such as industrial or business parks, have similar permit review and residual aquatic resource issues as residential subdivisions. As the size of the parcels making up these developments can vary widely, these developments are best examined on a case by case basis, however, portions of this document would be applicable to the review of such proposals.

These revised guidelines were developed in an effort to learn from earlier successes and failures. The following sections provide guidance on determining impacts to aquatic resources, protection of residual aquatic resources and upland buffers (where applicable) and permitting and evaluation procedures for phased developments.

III. Definitions

The definitions in this section are a combination of federal and state regulations and guidance are meant to provide clarification for this document. To the extent these definitions conflict with definitions in the regulations, the definitions in the regulations control.

Independent utility A test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the development project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent utility. The independent utility test includes physical features (infrastructure) and economic factors.

Phased Subdivisions: A residential, commercial, industrial, or mixed-use/master-planned development in which the plan of development (POD) is broken into smaller units or phases of construction. Phased developments may be located on a single piece of land or an assemblage of contiguous properties and are proposed by the same entity or by related entities. Phases of a development may be considered "single and complete" despite the possibility that the phase under consideration may share or depend on common infrastructure, financing, ownership, etc. associated with the earlier phases. The phase will be considered to be "single and complete" if it can "stand alone" from subsequent phases due to its independent utility. However, impacts in a phased development will be considered cumulatively.

Proffers: During the local approval process for projects, a developer may dedicate land for public use or construct a certain amount of infrastructure in order to proceed with his project (zoning proffers). Due to the requirement of localities, project proponents often include proffers (e.g., school sites, stormwater management facilities, sewage pump station sites, roads, sewer lines, drainage improvements, etc.) as part of their proposals. The key to determining whether any impacts associated with these proffers are considered part of the development will depend on whether or not the proffers involve providing land or actual development. If a proffer is limited to providing land, the locality will be responsible for obtaining a permit for any impacts to aquatic resources not the developer. However, if a proffer involves providing land and constructing a facility, any impacts to aquatic resources will be considered as part of the developer's project.

Real Estate Subdivision: The division of parcels into smaller parcels or the combination of 2 or more parcels into a larger parcel for the purpose of selling, conveying, transferring, leasing, or developing the resulting parcel(s). This includes the entire area of a residential, commercial, or industrial subdivision or a mixed-use or master-planned development divided or combined after October 5, 1984.

Residual Aquatic Resource A whole or portions of surface waters**,** including wetlands and streams, located within a project boundary that has not received authorization to be filled or otherwise impacted in accordance with State or Federal law.

Shared Infrastructure Those roads, utilities, and other infrastructure that are jointly owned, constructed, and/or used by more than one residential, commercial, municipal, or industrial development.

Single and Complete Project: The total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers which also has independent utility. A project may be considered to be "single and complete" if it can be constructed independent of any reliance on subsequent or previous permit authorizations for additional regulated activities (e.g., activities preceding or following those under the current authorization).

Unencumbered Land: Land within a residential lot or commercial project that is free of legal or environmental constraints that would prevent the construction of structures or removal of vegetation. Land located within a residential lot that does not contain aquatic resources or their associated protected buffers; unless authorized for impact. This land does not contain areas that are protected as required by other entities such as Resource Protection Areas (RPAs) or buffers to aquatic resources required by localities.

IV. Permitting Subdivisions and Phased Developments

When evaluating land development projects, we defer to the localities on many land use and project design issues. A land development project usually receives preliminary approval(s) at the local level (zoning, conditional use, conditional, tentative or preliminary subdivision approval, etc.) prior to detailed design, final locality approval. It is important to consider what has been preliminarily approved by the locality when determining potential individual and cumulative impacts to aquatic resources. In order to obtain preliminary approval, a developer must demonstrate that the project complies with local ordinances and, at a minimum; the project can be accessed with adequate roads, sewer and water connections, either by public or private means.

During the local approval process for projects, a developer may be required to dedicate land for parks, schools, roads, or to construct a certain amount of infrastructure in order to proceed with their project (proffers). All aspects of the development project must be considered in order to evaluate individual and cumulative impacts to aquatic resources. When determining if a project is single and complete, we must identify whether the developer would ***build*** certain land improvements if they were not required for their project. For example, if a locality will not allow a developer to sell residential lots in a proposed subdivision until they ***build*** one mile of sanitary sewer trunkline that will serve the proposed subdivision and other developments, the subdivision is not feasible without the sanitary sewer trunkline. The subdivision cannot be constructed but for the sewer; therefore the subdivision is not a single and complete project. In other words, the subdivision is not separate from the sewer; the subdivision and the sewer are part of a single project. All impacts from both activities would need to be considered cumulatively but could be permitted separately.

If a zoning proffer is limited to providing land (i.e., for a school or a road), and the developer is not undertaking any construction on the dedicated land, any potential impacts resulting from the development of the dedicated land are considered separate from the developer's project.

Applicants should submit an application for all aspects of the single and complete project, including any impacts associated with proffers or related phases. It may be possible to phase the permitting of a phased development in accordance with agency regulation.

V. Residual Aquatic Resource Considerations

When permitting a project with residual aquatic resources, the agency personnel should consider the location and the best manner to protect those remaining resources. This section presents a tiered approach of agency preference in dealing with residual aquatic resources.

Previous guidance required that all residual aquatic resources remaining on lots of 15,000 square feet or less (with sewer/water service) be considered impacted even if the applicant was not proposing to physically fill these areas. For lots without sewer/water (septic service), the minimum lot size was raised to

30,000 square feet or less to account for the area required for septic tanks and drain fields. This guidance generally required deed restrictions for all residual aquatic resources in subdivisions to protect them. These guidelines did not prevent additional impacts to residual aquatic resources, typically due to property owner misunderstanding/noncompliance with the deed restrictions.

The primary solution is to avoid having any residual aquatic resources and their associated protected buffers within individual residential lots regardless of recordation of a deed restriction. Preferred alternatives for dealing with residual aquatic resources are listed below in order of preference. These alternatives should be considered during avoidance and minimization review.

1. All residual aquatic resources and their associated protected buffers should be located outside of individual lot lines, in the following order of preference:

    a. All residual aquatic resources should be preserved in an easement to be held by a third party or public entity (TNC, VOF, state or locality)

    b. All areas of concern preserved in an easement held by a viable Home Owners Association.

2. If residual aquatic resources/buffers must be located within lots, in the following order of preference:

    a. All residual aquatic resources should be located within one or two large lots and preserved with an approved deed restriction. The lots must be of adequate size as indicated below.

    b. If residual aquatic resources/buffers must be distributed among and within several individual residential lots, all residual aquatic resources/buffers must be preserved within lots of adequate size (see below) and located in the back of lots. Where there is an obvious demarcation of aquatic resources (i.e., swamps, marshes, severe topographic change leading to aquatic resource) which would inhibit impact from future homeowner activity, the project manager has the discretion to consider the resource as unimpacted, provided they are protected by a deed restriction. Landowners may not be able to readily identify aquatic resources where there is no such demarcation.

    c. If residual aquatic resources/buffers must be distributed within several individual residential lots, the lots must be of adequate size to lower the risk of additional impacts from future homeowner activity. Adequate lot size is based on the type of sewer utility involved.

        i. Where public sewer is available and where a lot contains less than ½ acre of unencumbered land, all waters should be considered impacted.

        ii. Where public sewer is not available, and where waters are located within lots that do not contain ½ acre of unencumbered land in addition to the minimum needed for the septic system drain field, and the area effectively drained by any associated perimeter ditching, all waters will be considered impacted. The area effectively drained for septic purposes is typically 1 acre.

VII. Compliance

As with all projects, when permit compliance issues or enforcement cases are found or reported, agency staff must proceed with actions to bring the project into compliance. Commonly, noncompliance issues will typically include impacting more onsite wetlands or streams than permitted; poor or failing erosion control measures; no evidence of deed restriction recordation; or encroachment into buffers. Each agency

must follow their own process and procedure to resolve compliance and enforcement cases. However, DEQ and COE staff should coordinate compliance and enforcement activities when possible to reduce duplication of effort and increase consistency in resolution of compliance issues. When a project has received both state and federal permits, agency staff should coordinate all compliance efforts. When only one agency is responsible for issuing a permit, notification is encouraged to occur when circumstances merit the involvement and assistance of the other agency by aiding the resolution (for instance, additional impacts resulting in a change in the permit required). Enforcement cases where no permit has been issued should be pursued by each agency, particularly for larger cases, in accordance with agency processes and procedures.

In some cases, the landowner can resolve compliance or enforcement issues by permitting the project to allow the completion in a manner that avoids further damage to a wetland or watercourse and that is agreeable to the agencies. The practice of issuing an after-the-fact permit, particularly for relatively minor impact situations, should be limited as it has the consequence of removing the deterrent to acting without a permit.

MEMORANDUM OF UNDERSTANDING AMONG THE VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, THE VIRGINIA DEPARTMENT OF GAME AND INLAND FISHERIES, AND THE VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION REGARDING SCREENING AND COORDINATION PROCEDURES DURING THE VIRGINIA WATER PROTECTION APPLICATION REVIEW PROCESS

The intent of this Memorandum of Understanding (MOU) is to describe procedures for coordination among the Department of Environmental Quality (DEQ), the Department of Game and Inland Fisheries (DGIF), and the Department of Conservation and Recreation (DCR) [1] during the Virginia Department of Environmental Quality's Virginia Water Protection Permit (VWPP) review process to obtain input regarding the potential for significant impairment of state waters, fish and wildlife resources, and threatened or endangered species. This MOU specifically addresses VWP permits regulating impacts to surface waters, including wetlands, and review for species and habitat that are protected by the Virginia Endangered Species Act (Title 29.1, Chapter 5, Article 6, Sections 29.1-563 through 29.1-570 as amended of the Code of Virginia) and the Endangered Plant and Insect Species Act (Title 3.1, Chapter 39, Sections 3.1-1020 through 3.1-1030 as amended of the Code of Virginia). This MOU, however, does not constitute, convey, or imply authority to any permit applicant or recipient to unlawfully take any wildlife or plant species otherwise protected by Virginia laws or regulations (e.g., "incidental take" of a Threatened or Endangered species).

The participating agencies agree to the following procedures for coordination during the review of VWP permits:

1. When DEQ receives a VWPP application, DEQ will screen the proposed surface water impact location for the presence of state or federally listed threatened or endangered (T&E) species, designated Threatened and Endangered Species Waters, and sensitive fish, wildlife, and plant resources using the DGIF Virginia Fish and Wildlife Information Service online database and the Virginia Department of Conservation and Recreation, Division of Natural Heritage, Natural Heritage Data Explorer. DEQ will screen applications using the databases to perform a 2-mile radius search around the proposed impact location(s).

2. If the database searches indicate the presence of state or federally listed threatened or endangered species, designated Threatened and Endangered Species Waters, anadromous fish waters, colonial waterbird colonies, or trout streams within 2 miles of the surface water impact, DEQ will coordinate with DGIF and/or DCR for information regarding the potential impacts to these resources. This coordination will initially be submitted to DGIF and DCR on a VWP Permit Natural Resources Consultation Form. In the notification, DEQ will provide information including: permit applicant name; contact information; location information including latitude and longitude; the receiving stream, if applicable; description of the impact area; description of the entire property; a topography map identifying project boundaries; and the results of the database search.

3. DGIF and DCR will have 14 calendar days for a VWP general permit review and 45 calendar days for an individual permit review in which to provide comments on the permit application. Paraphrasing from the Code of Virginia §62.1-44.15:5.F, DEQ will give full consideration to the written recommendations of DGIF and/or DCR regarding the potential impacts to fish, wildlife, plant and natural community resources. If written comments are not submitted by DGIF and/or DCR within these time periods, or within any extended commenting periods approved by DEQ, then DEQ shall assume that DGIF and/or

[1] Under a Memorandum of Agreement established between the Virginia Department of Agriculture and Consumer Services (VDACS) and DCR, DCR represents VDACS in comments regarding potential impacts on state-listed T & E plant and insect species.

DCR have no comments on the proposed permit, and DEQ will continue processing the permit application.

4. DGIF and DCR agree to provide specific comments related to the potential impacts to threatened or endangered species that could occur as a direct result of the proposed surface water impact. These comments are required to be addressed by DEQ during the decision to issue or deny the permit.

5. DGIF and DCR may also provide specific comments related to the overall potential project impacts to Species of Greatest Conservation Need (Tiers I-IV) as identified in the DGIF Wildlife Action Plan; Natural Heritage Resources as identified by the DCR Natural Heritage Division; or other species or natural communities of concern to these agencies. DEQ will determine whether these comments are related to the surface water and/or wetland impacts, and whether further avoidance, minimization, or compensation is appropriate. If the comments regarding these resources do not pertain to the surface water and/or wetland impacts, then DEQ may determine to not require any further action by the applicant based on those comments.

6. DGIF and DCR agree to be specific with their comments in terms of their requests for species surveys, recommendations for reduction of impacts, or suggestions for mitigating impacts. Comments should be provided in a manner that clearly distinguishes between the following:

    - **No objection to the activities proposed in the permit application.**

    - **General suggestions to minimize project impacts such as employing erosion and sediment control measures, stormwater controls, buffer recommendations, and mitigation alternatives.**

    - **Surveys required to confirm presence of T&E species or habitat within the proposed project's direct surface water impact area, or within 2 miles downstream thereof.** If a survey shows T&E species are present at the proposed impact site or within 2 miles downstream of affected waters, DEQ will coordinate with the permit applicant and DGIF/DCR to discuss changes needed to the project to mitigate for their presence and any potential impacts.

    - **Recommendations to conduct surveys for listed T & E species located within the project site, but that are not within the direct impact area of the proposed project.** The applicant may be required to survey for these species at the discretion of DEQ.

    - **Recommendations to conduct surveys for those resources of concern that are not listed threatened or endangered within the direct impact area.** These recommendations will be provided to the applicant as suggestions, but will not likely be required by DEQ as part of the VWP process.

    - **Recommendations to conduct surveys for non-listed species, habitats, or natural communities located within the project site, but that are not within the direct impact area of the proposed project**. These recommendations will be provided to the applicant as suggestions, but will not likely be required by DEQ as part of the VWP process.

- **Recommendation for denial for projects that will have a significant impact on fish and wildlife resources, threatened or endangered species, plants, or natural communities.** In the event that a proposed project is deemed unacceptable to the DGIF and/or DCR as a result of potential impacts to fish and wildlife resources, threatened or endangered species, plants, or natural communities, the comments shall clearly state the agency's opposition to the project and specifically express recommendations for denial. Each agency should be prepared to support their position at a meeting(s) with the applicant or before the SWCB if necessary.

- **Additional Recommendations.** In the event that DGIF and/or DCR believe a proposed project may result in significant impact to fish or wildlife resources, plants, or communities, but that there are measures available that would appropriately mitigate for those impacts, then DGIF and DCR may make additional recommendations for DEQ's consideration.

7. DEQ will respond to the comments provided by DGIF and/or DCR with the actions being undertaken, and will coordinate survey implementations or other information development with the appropriate agencies during the processing of the permit. DEQ, however, shall make the final determination to issue or deny any VWP permits, including final determination of specific permit conditions.

The undersigned agree that these procedures for coordination will be used to evaluate VWP permit applications for impacts to surface waters of Virginia.

Signed: _____ Date: 1/9/2007

David K. Paylor, Director
Virginia Department of Environmental Quality

Signed: _____ Date: 01/10/07

J. Carlton Courter III, Director
Virginia Department of Game and Inland Fisheries

Signed: _____ Date: 1/16/07

Joseph H. Maroon, Director
Virginia Department of Conservation and Recreation

DEPARTMENT OF ENVIRONMENTAL QUALITY
AGENCY POLICY STATEMENT NO. 1-2006

SUBJECT: REGULATORY GUIDANCE DEVELOPMENT

REFERENCE: §2.2-40001 of the Code of Virginia

EFFECTIVE DATE: **same as signature date**

Summary:

This guidance was developed to address the first action plan in DEQ's Strategic Priorities, 2010, which is to issue regulations and implementation guidance at the same time. In addition, the Permit Efficiency Study recommended improvements to the format and utility of agency program guidance.

These steps have been developed to ensure the successful implementation of each regulation. Prior to initiating a regulatory action, the agency will consider guidance. If circumstances do not allow the guidance (or a plan for guidance) to be developed by the time the regulation is effective, the agency staff will at least be aware of the regulatory action and that guidance will soon follow.

Electronic Copy:

An electronic copy of this guidance is available on DEQ's website at http://www.deq.virginia.gov/

Contact Information:

Please contact Karen Sismour at (804) 698-4421 or kjsismour@deq.virginia.gov with any questions regarding the application of this guidance.

REGULATORY GUIDANCE DEVELOPMENT

I. Introduction:

The Department of Environmental Quality's "Strategic Priorities, 2010" identifies the long-term goals of the agency. One of these goals is to improve program capabilities by developing programs that are more efficient. One of the methods identified to garner this efficiency within the agency is to "issue regulations and implementation guidance at the same time." Also, the Permit Efficiency Study conducted in 2005 recommended improvements to the format and utility of agency program guidance.

The purpose of this document is to assist DEQ staff to:

- determine if guidance is necessary for a particular regulatory action,
- create a guidance development plan as a regulatory action is being contemplated, including regional participation, roles and responsibilities, and timeframes, and
- standardize the manner and format in which guidance is prepared.

By using this outline, guidance development will become part of the agency's standard regulatory development process.

II. Background:

All media programs develop guidance for a variety of reasons. Finding common ground regarding the rationale for developing guidance from program to program proves difficult at best. However, universally, guidance is developed to assure that programs meet the intended goal and function in a consistent manner. Often, guidance is developed after a problem or inconsistency is identified. Guidance cannot, however, create legal obligations beyond those required by existing law or regulation. Because guidance is required to achieve clear and consistent program objectives, guidance should be available to program staff and the regulated community before a new regulation becomes effective. However, in some cases, where regulations have been in place for some time, guidance may still be needed when problems or inconsistencies emerge.

In order to identify potential problems that may arise when a new regulation is issued or when an existing regulation is modified, communication between the various affected program areas is essential. If a new regulation has the potential to impact multiple program areas or if a regulation has the potential to have a significant impact on the regulated community, the regulation should be developed with the assistance of a project team that will develop any implementation guidance.

The goal is to prepare the guidance before the regulation becomes effective. Guidance may also be needed when implementing new legislation. The ideal timeframe during the regulatory process for guidance development varies based on the regulation that the guidance is intended to support. The source of the new regulation (federal or state requirement) can also affect the optimum timeframe for the development of guidance, as well as the need for guidance. The development of guidance will ultimately become an integral part of the development of regulations; however, the development of guidance must serve the timetable of the regulatory process, not vice-versa. Regulations will be written as clearly as possible, to strive for no guidance necessary; however, since regulations need not be encumbered by overly technical details or explanations, guidance is often needed to help interpret their applicability and use. In addition, guidance may be needed to outline and detail internal procedures that are not appropriate for inclusion in regulations.

This guidance was developed by a team of central office regulation and guidance developers and regional staff. This issue is addressed in two earlier documents and is expanded upon here: 11/16/98 Roles of Regional and Central Office, known as the 5 C's memo, and 7/20/00 Collaboration Process.

III. Definitions

"Division Director" means the director of the Air Division, Water Quality Division, Water Resources Division or Waste Division, as applicable.

“Guidance” means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations (§2.2-40001 of the Code of Virginia).

“NOIRA” means the Notice of Intended Regulatory Action. NOIRA and other stages of regulatory development are explained on the Town Hall website, Guide to Virginia’s Regulatory Process, at: http://www.townhall.state.va.us/dpbpages/apaintro.cfm

“Plan” means the guidance development plan explained in IV.B.

"Team Leader" means the individual tasked with the development of implementation guidance. In some cases, the team leader and the regulation writer may be the same person.

"Project Team" means a workgroup of DEQ staff assigned to work with the team leader to develop implementation guidance. The project team is made up of the individuals whose programs may be impacted by the regulation. It may also include members of the regulated community.

"Regulation Manager" means the manager overseeing the development of the regulation.

"Regulation Writer" means the individual tasked with the development of the regulation. In some cases, the regulation writer may function as the team leader.

IV. Procedure for Developing Guidance

A. Prior to Regulatory Action

As staff uses regulations and encounter issues and concerns, they should send their concerns to the appropriate Regulation Manager. The Regulation Manager (or Division Director Designee) will solicit input from impacted staff, prior to the NOIRA stage if possible. Staff participation will be solicited on regulatory actions, regardless of the need for a guidance document. The standard two-week minimum review time will be used, unless the Regulation Manager justifies and the Division Director approves a shorter timeframe.

B. Regulatory Action and Guidance Development Plan

Prior to initiating a regulatory action, the Regulation Manager (with assistance from other division staff) will prepare a guidance development plan (Plan) along with the NOIRA Approval Package to include the following information:

1. the content of the rulemaking (new regulation, change in law, etc)
2. the rulemaking schedule
3. the program areas potentially impacted
4. the number and types of facilities potentially impacted
5. any special issues or priorities associated with the regulation
6. whether the development of guidance is needed
7. the timeframe for guidance development
8. whether a project team is needed to develop guidance
9. a team leader and suggested team members (either individuals or position types or to be determined after plan is approved)
10. the process for training staff on the regulation and guidance
11. the timeframe to revisit the guidance (suggest 1-2 years after implementation).

Time for Plan Development: The Regulation Manager may need to work with impacted program managers on some of these items. If time permits, the Plan will be fully developed prior to the NOIRA stage. If the NOIRA must proceed prior to Plan development, then the Regulation Manager must justify the need and receive approval from the Division Director to proceed with the NOIRA, and the Plan can be developed during the regulatory process. If the regulatory action does not involve a NOIRA stage, then the plan can be a simple statement of the content of the rulemaking and any other applicable items. The key is to have the Regulation Manager consider each item above before the regulatory action is started.

Time for Guidance Development: While setting the timeframe for guidance development, keep in mind the goal is to issue regulations and guidance at the same time. In some instances, the appropriate time to review the regulatory changes and develop guidance will be after a proposed regulatory change has been published for comment. In some circumstances, it may be best to begin the guidance development one month prior to the final regulation going to the Board. If the regulation is expected to be controversial, then the Plan can explain the circumstances, and state that the guidance will be developed as soon as possible following final Board Action (within 6 months). Note that guidance cannot be finalized until after the Board has taken final action on a regulation as there may be changes to procedures as a result of public comment or Board action. The goal remains to provide staff with the proper tools to implement the regulation when the regulation is effective.

The Regulation Manager will submit the Plan to the Division Director. The Division Director will notify the Executive Management Team of the regulatory action and solicit input on the Plan, including any management or policy issues associated with the guidance or regulation and project team interest. Then the Division Director will revise the Plan as necessary and approve it.

C. Assembling a Project Team

Suggested steps for assembling a project team are provided below:

1. The Regulation Manager (or Division Director Designee) is responsible for assembling the project team.
2. The Team Leader will solicit project team participants from the regulation writers, guidance developers, and program areas impacted (permit writers, inspectors, etc.). The Regulation Writer should be on the project team. Close coordination and communication between the Team Leader and Regulation Writer will be maintained throughout the guidance development process.
3. Regional participation in the development of guidance is essential if the regulation is to be implemented at the regional level.
4. If the participatory approach is used in the regulatory development process, the Team Leader, along with other project team members, may participate in the regulation development. The Team Leader and/or other team members should be on the Technical Advisory Committee (TAC).
5. The Division Director will notify the Project Team members and their supervisors as to their membership on the project team.

D. Developing Guidance

Recommended items to consider in the development of guidance include:

1. The Project Team will determine the type of guidance that is needed to implement the regulation. Guidance may include checklists, submission instructions, boilerplates, frequently asked questions, etc.
2. The guidance should provide a synopsis and chronology of any existing guidance on this regulation or specific subject area and the intent of the updates provided herein.
3. The Project Team will coordinate with EPA and other agencies, as appropriate. The team will consider the guidance needs of DEQ staff, the regulated community, and citizens. The team may post draft versions on the web for regulated community and citizen input.
4. The Team Leader will continue to serve as the point of contact for the Project Team and will coordinate the development of guidance by holding meetings and monitoring the progress. The Team Leader will also ensure that comments are solicited from applicable program areas as well as all impacted program managers and staff. The standard two-week minimum review time will be used, unless the Team Leader justifies and the Division Director approves a shorter timeframe.
5. The program managers will be responsible for obtaining staff input regarding the documents and will coordinate responses to the Team Leader as applicable.
6. The Team Leader will advise the Regulation Manager/Division Director of any conflicts or project team performance issues. The Regulation Manager/Division Director will resolve any disputes brought forward during the development of the guidance.
7. The Project Team will prepare a response to comments with the rationale for the approach chosen to ensure staff comments are addressed.
8. After the guidance document is completed, it will be forwarded to the Division Director for approval. Final guidance will be posted on the web.
9. A trial period may be appropriate to field test guidance or it may be appropriate to have a few program staff conduct pilot application of the guidance to specific situations to identify whether or not it is appropriate and effective for meeting program goals.
10. New guidance should be revisited 1-2 years after issuance. Each guidance should routinely be reviewed every 5 years for effectiveness, the need for revision, and/or the removal of any outdated guidance by the unit that developed the guidance.

V. Attachments

Guidance Template - The recommended format for guidance development.

This policy is approved on the following date:

David K. Paylor — 4/17/2006

David K. Paylor
Director

Date

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: [Air, Water Quality, Water Resources, Waste] Guidance Memo No. ##
TITLE OF GUIDANCE

To: [Regional Program Managers, Office Directors, Program Staff, etc]

From: [Division Director]
[Air, Water Quality, Water Resources, Waste] Division Director

Date: date

Copies: [Regional Directors, Deputy Regional Directors, etc.]

Summary:

Give an executive summary of the guidance, including the purpose and the statutory or regulatory provisions that are being interpreted. The goal is to keep this cover memo to one page.

Electronic Copy:

An electronic copy of this guidance is available on DEQ's website at http://www.deq.virginia.gov/_____.

Contact Information:

Please contact [DEQ staff at (804) 698-xxxx or xxxxx@deq.virginia.gov with any questions regarding the application of this guidance.

Disclaimer: [include as appropriate, usually for external guidance]
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

TITLE OF GUIDANCE

1. Introduction – State why the guidance is needed.

2. Background - Provide a complete description of the situation that the guidance is intended to address. Provide concrete information, and cite examples of areas that have been problems in the past or what situations exist that require clarification to be provided. Please do not include the names of specific facilities or owners in guidance.

3. Authority - Cite the basis in law and regulation for the guidance and/or the law or regulation that is being interpreted. This may not be necessary for some internal procedures.

4. Definitions - Provide a list of definitions that will be used and the source of the definition. Cite the law or regulation on which the definition is based, or the rationale for the definition provided.

5. Guidance - The guidance should provide specific information on how the agency interprets or applies certain provisions and/or specific examples of what people can do to meet our regulatory expectations. Remember that guidance cannot be used to impose new obligations or requirements on regulated facilities, but is used to assist in interpreting or applying existing provisions. Clearly lay out roles and responsibilities of DEQ staff, any timeframes involved, and any expectations.

6. Additional Information as attachments or web links.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY PROGRAMS
ELLEN GILINSKY, Ph.D., DIRECTOR

P.O.BOX 1105 **Richmond, VA 23218**

Subject: Guidance Memorandum Number 06-2015
Virginia Water Protection Permit Program Staff Manual

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: October 31, 2006

Copies: Deputy Regional Directors, Regional Water Permit and VWP Managers, VWP Staff

Summary:

The Virginia Water Protection Permit Program Manual (Manual) is a living document that undergoes a continual update and revision process to: reflect the program changes made to the VWPP Program Regulation (9 VAC 25-210-10 et seq.) and the VWP General Permit Regulations (9 VAC 25-[660, 670, 680, 690]-10 et seq.); clarify certain procedures; and incorporate new or revised program guidance, guidelines, policies, and decisions. This allows the Manual to be a consolidated and up-to-date reference for VWPP Program staff as they implement the program.

In keeping with DEQ initiatives on Pollution Prevention and digital government, the Manual will not be printed in hard copy. Rather, the most recent version of the manual will be available electronically, as noted below.

Sections 1 through 4 of the VWP Permit Manual were last updated in October 2006. The manual contains a footer that notes the most recent revision date. The most recent version of the manual or portions thereof supersedes all previous versions of the VWP Permit Manual, or the applicable portions thereof. The revisions to the remaining sections of the manual will be posted electronically to DEQNet and the DEQ public web page as they are completed, and DEQ VWP permit staff will be notified of their availability.

Revisions to the electronic manual will be made on a continual basis, as needed, and the VWPP Program staff will be notified of the revisions via email. Refer any public requests for copies of the manual to the VWP Permit Program in Central Office.

This guidance memorandum supersedes all previous guidance memorandums related to revisions of the VWP Permit Manual.

Electronic Copy:

An electronic copy of this guidance in PDF format is available internally for DEQ staff on DEQNET. An electronic copy of this guidance in PDF format is available for the general public on DEQ's website at: http://www.deq.virginia.gov/wetlands/contact.html.

Contact information:

Please contact David Davis, Acting Manager of the Office of Wetlands and Water Protection at 804-698-4105 or dldavis@deq.virginia.gov if you have any questions about the VWP Permit Manual.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data or establishment of permit conditions.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY PROGRAMS
ELLEN GILINSKY, Ph.D., DIRECTOR

P.O.BOX 1105 **Richmond, VA 23218**

Subject: Guidance Memorandum Number 06-2014

Revisions to the Virginia Water Protection General Permits 9 VAC25-660, 9VAC25-670, 9VAC25-680, 9 VAC 25-690 (Effective August 1, 2006)

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: October 25, 2006

Copies: Deputy Regional Directors, James Golden, Richard Weeks, Regional and Central Office Water Protection Permit Managers and Program Staff

Summary:

The Virginia Water Protection General Permits were first promulgated in October 2001 and revised in January 2005. The permit regulations had a life of five years and were scheduled to expire August 1 (WP3 for Transportation projects) and October 1 of 2006 (WP1 for impacts less than one-half acre, WP2 for utility projects, and WP4 for development and mining projects). In anticipation of the impending expiration, the regulations underwent a regulatory review and subsequent revisions were made to clarify terminology and intent, correct inconsistencies between the general permits and the main regulation, to improve program efficiencies and processing. The regulations were then extended for an additional 10 years with an expiration date of August 1, 2016. The purpose of this guidance is to summarize key changes to the general permits (GPs) and discuss transition issues between old and new regulations.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov.

Contact information:

Please contact Brenda Winn, Virginia Water Protection Permit Environmental Specialist, at (804) 698-4516 or bkwinn@deq.virginia.gov if you have any questions about the revised VWP General Permits.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, or establishment of permit conditions.

Revisions to the Virginia Water Protection General Permits 9 VAC 25-660, 9 VAC 25-670, 9 VAC 25-680, and 9 VAC 25-690

(Effective August 1, 2006)

Background:

Four Virginia Water Protection General Permits (GPs) were first promulgated in October 2001. Interim revisions were made to all four GPs in 2004, which became effective January 26, 2005. The permits had a life of five years and were scheduled to expire August 1 (WP3) and October 1 (WP1, WP2, and WP4) of 2006. With the impending expiration, the regulations underwent a regulatory review and subsequent revisions were made through the APA process. These revisions became effective and superseded all previous general permit regulations on August 1, 2006.

Revisions:

Section 10 – Definitions

1. In Section 10, Definitions, there were additions and deletions made to several definitions to be consistent with the main VWPP program regulation and with Section 404 CWA terms. Important changes included "streambed" and "phased development" as it is used in § 80 (Notice of Planned Changes).

Section 20 – Purpose; delegation of authority; effective date of VWP general Permit

2. The effective period of the regulations was increased to 10 years. The permit regulations will expire in August 2016. This would not preclude any interim reviews and revisions as necessary.

3. The permit authorization period was increased to seven years for General Permits WP2, WP3 & WP4. Increasing the authorization period by two years will allow permittees additional time to complete their mitigation obligations, which was often a reason for permit extensions. No change was made to the three-year authorization period for WP1.

Section 30 – Authorization to impact surface waters

4. The thresholds of coverage for permitting impacts to surface waters were amended, separating and providing specific thresholds for wetlands or open water, versus stream impacts (previously combined all together as "surface waters"). Stream impacts are no longer converted to an acreage and applied to the usage threshold acreage. These thresholds apply to temporary and permanent impact and are as follows:

WP1: less than ½ acre wetlands or open water, and up to 300LF streambed
WP2: up to 1 acre wetlands or open water, and up to 1,500 LF streambed
WP3: up to 2 acres wetlands or open water, and up to 1,500 LF streambed
WP4: up to 2 acres wetlands or open water, and 1,500 LF streambed

5. The distinction between perennial and nonperennial streams was eliminated and instead the term "stream bed" is used for determining linear footage coverage under the general permits (Section 30 A). This change was made to eliminate difficulties that led to disputes and time delays in permit processing. Use of the term "stream bed" is also consistent with terminology the Corps uses, and does not give the erroneous impression that intermittent streams are less important than perennial streams in terms of their water quality functions.

Section 50 – Notification

6. This section clarifies the provision regarding impacts to deed-restricted wetlands. Coverage of impacts to wetlands already protected by any type of protective covenant (i.e., deeds, easements, etc.) is allowed under the general permits. However, if the deed restriction was created as part of a prior permit mitigation package and is now slated for impact, then the applicant must complete a full application with mitigation for the previously protected wetlands.

7. The revision now states that impacts to wetlands/open waters/streams, protected by deed restrictions or similar protective instruments imposed by previous permit actions, require review and may require mitigation for the area formerly protected, regardless of size. If the deed-restricted area is less than 1/10 acre, then no fee would be required per the fee regulation even though a full application is required.

8. The revisions now include a requirement that reporting-only applications (§ 50 – Notifications) must include a location map (§ 60 B 9), except for VDOT-administered projects (see #9 below), and must disclose if protective instruments apply to impact areas (§ 60 B 20). (The revision prohibits use of reporting-only authorizations for impacts to deed restricted areas; a full permit application is required per #6 above.

9. In WP3, Section 50 A 2 a excludes VDOT from the requirement to provide a detailed project location map. Through an MOU with DEQ, VDOT provides a detailed monthly spreadsheet for reporting-only projects, with sufficient information to locate the projects

Section 60 – Application

10. Section 60 B 1 was modified to state that cross-sectional or profile sketches *may* be required.

11. A clarification was added to Section 60 B 19 that the application fee for stream impacts is based upon aerial measure (acreage).

12. Section 60 B 20 was added to require the applicant to disclose if any surface waters within the project boundary are under protective covenant.

13. Language was added to the regulations to allow for the administrative withdrawal of incomplete applications after 180 days of application receipt (Section 60 E).

Section 70 – Compensation

14. Language in Section 70 was modified to be consistent with the main VWPP regulation (9 VAC 25-210) regarding when off-site or out-of-kind compensation is more appropriate than on-site or in-kind compensation. The applicant must demonstrate that their proposed off-site or out-of-kind option(s) is ecologically preferable to practicable on-site or in-kind compensation options. This documentation should address the type, location, functions, values of these options under consideration and how the option sufficiently compensates for the wetlands that will be impacted. Note that for WP1 this is not required as all mitigation under that general permit is to either a bank or in-lieu fee fund.

Section 80 – Notice of Planned Change

15. The length of stream bed that can be impacted under the Notice of Planned Change (§ 80 B) was increased to 100 feet (previously 50 feet) to better accommodate minor changes during construction. Wetland/open water impacts that qualify for a planned change remain at 0.25 acre. A new impact that is not associated with previously authorized activities in authorized locations within the same phase of development or within logical termini (or do not meet the other criteria in Section 80) is not considered a Planned Change but is a new impact. .

16. In WP2 and WP3, the phrase "within the same phase of development or within logical termini" was included in § 80 (Notice of Planned Changes), as the project boundaries within which changes would be considered. Logical termini is a term typically related to linear projects and represents the rational end points for a project design or corridor study and does not preclude staged construction. Related improvements within a planned facility can be evaluated broadly as one project, rather than selecting termini based on what is planned as short range improvements. This provides a clearer picture of the transportation or utility line requirements in the project area and a better understanding of the project purpose and need.

17. Provisions were added to Section 80 B that allow DEQ to require submission of a compensatory mitigation plan for additional impacts. However, the new language does not allow for increases in impacts for reporting-only authorization if the reporting-only thresholds are exceeded (i.e., ½ acre wetlands or water/ or 300 LF stream). In such instances a new permit application and fee would be required. The request must be submitted prior to initiating the expanded impacts.

Section 90 – Termination of authorization by consent

18. Section 90 4 c was amended to allow the substitution of one type of compensation with another type of compensation, because such a change is not covered under a Notice of Planned Change. Many other scenarios may qualify under this section.

Section 95 – Transition

19. Transition language was added to address how to handle applications/modifications received before or after effective date of GP renewals. See detailed discussion in the "**Permit Application and Authorization Processing During Transition Period:**" section below.

Section 100 – VWPP General Permit

20. Part I A 5 - The permit authorization period was increased to seven years for General Permits WP2, WP3 and WP4. Increasing the authorization period by two years will allow permittees additional time to complete their mitigation obligations, which was often a reason for permit extensions. No change was made to the three-year authorization period for WP1 as all mitigation is to a bank or in-lieu fund.

21. Section 100, Part I C 17, which prohibits the discharge of untreated stormwater to any surface water, was deleted. Stormwater management permitting authority was transferred from the DEQ and is now under the authority of the Department of Conservation and Recreation (DCR). While there are still conditions for compliance with temporary and permanent SWM controls per the Erosion and Sediment and Stormwater Management laws and regulations, DEQ should defer design reviews and approvals to DCR or its delegate (i.e., a local government). While it is desirable that all activities permitted through the VWPP program are in compliance with these other laws and regulations, the elimination of the above noted condition eliminates the implied requirement that every pipe, regardless of size, discharging to surface waters required treatment. Enforcement of noncompliance with these other laws and regulations that result in an impact to state waters should be coordinated with DCR and the local government to ascertain which agency should take the lead or whether one or more agencies should take enforcement action. DEQ should take the lead for compliance actions associated with specific requirements of VWP regulations and permits. If the inspector notices violations of the sediment and erosion control laws in uplands that are not impacting the wetlands or stream then refer these cases to the local sediment and erosion control office and DCR field office manager for follow up. If the inspector can document impact to the stream and wetlands then refer the case as above and issue an NOV through the Regional DEQ enforcement section on the impact. If DCR or Local E&S staff discover E&S violations during inspections and request staff assistance to determine and document impairment DEQ staff will provide such assistance.

22. Section 100, Part II A 8 clarifies a mitigation condition, requiring plantings of indigenous species, which should be in the riparian zone, not in the stream itself.

Permit Application and Authorization Processing During Transition Period:

1. Process applications and authorizations in accordance with either the general permit regulations effective January 26, 2005 or August 1, 2006, as detailed below. The following citation is the same for all four general permit regulations effective August 1, 2006.

> ***9 VAC 25-[XXX]-95. Transition.***
>
> *A. All applications received on or after August 1, 2006 will be processed in accordance with these new procedures.*
>
> *B. VWP general permit authorizations issued prior to August 1, 2006 will remain in full force and effect until such authorizations expire, are revoked, or are terminated.*
>
> *C. Notices of Planned Change and all other types of notification that are received by the board prior to August 1, 2006 will be processed in accordance with the VWP general permit regulation in effect at that time. Notices of Planned Change and all other types of notification to the board that are received on or after August 1, 2006 will be processed in accordance with these new procedures.*

Section -95 A of each general permit regulation allows that permit applications received before August 1, 2006 (this is the initial application, not when the application is "complete") should be processed under the old permit regulations, even if the permit authorization ends up occurring after August 1, 2006. While the old general permit regulations are no longer effective, DEQ has, in effect, incorporated the old regulation provisions through Section -95 A above. The phrase 'new procedures' in -95 A and C above refers to the regulation effective August 1, 2006.

Authorizations issued on or after August 1, 2006 that are based on applications received prior to August 1, 2006 will contain the 3 or 5 year expiration term and the Part I, II, and/or III conditions from the general permit regulations effective January 26, 2005. Also, the permit cover page will need to contain the old language rather than the new language (see 2005 VWP permit manual for conditions and cover page templates).

Authorizations issued on or after August 1, 2006 that are based on applications received on or after August 1, 2006, will contain the three- or seven-year expiration term and the Part I, II, and/or III conditions from the general permit regulations effective August 1, 2006. Use the conditions and cover page templates distributed to VWP staff in July 2006, until such time that the 2006 VWP permit manual is available.

If a region receives a Notice of Planned Change request after August 1, 2006 for an authorization that was issued prior to August 1, 2006, the process may occur in one of two ways: 1) the increased impacts are within the new usage thresholds, in which case, the request can be approved, and the permittee may continue with the authorized activity; or 2) the increased

impacts are not within the new usage thresholds, in which case, the request cannot be approved; the previous general permit authorization must be terminated; and the previous permit holder must reapply for a different type of VWP general permit (if applicable), or a VWP individual permit.

2. For those regional staff who want to close the loop on old, incomplete applications (prior to August 1, 2006) that have been in the CEDS system for some time, a courtesy phone call should be made to the applicant inquiring as to their intentions. If after the phone call, the applicant still hasn't taken action, then write the applicant a letter stating that DEQ has had Permit Application Number WP[#]-[##]-[####] since [Date] (at least 180 days since initial receipt by the correct office), and if DEQ does not receive a reply from the applicant within 15 days, indicating that the applicant is still pursuing the proposed activity and will submit the requested additional info within [number of days], DEQ will withdraw the permit application. You may want to add that after the application is withdrawn, a new permit application and permit application fee will be required, that is subject to the VWP general permit regulations in effect at the time of application. Staff should consider whether or not there has been some effort on the part of the applicant between the initial application submittal and now. Also consider sending the letter by certified mail or return-receipt requested.

   For those permit applications where a phone call has been made and/or a letter is sent, be sure to record the necessary facts in CEDS (Documentation Screen at a minimum).

   If DEQ does not receive a response from the applicant in the time allotted, document CEDS and move the permit record to History.

CEDS Data Entry:

In the interim between August 1, 2006 and the release date of the CEDS VWP screen upgrades, the following procedures will apply for entering general permit authorization records into CEDS.

Beginning August 2, 2006, the General Information screen in the VWP General Permit module will contain a drop-down list of choices for the Permit Term field. This field will no longer automatically populate once you choose a Permit Type. For the Permit Term field, choose either three, five, or seven years based on the processing procedures detailed in this guidance memorandum. A term must be entered before moving the record from the Application phase to the Active phase. The choice of zero years (0) in the Permit Term field was used historically for No Permit Required (NPR) actions; since staff should not be entering NPR actions into CEDS any longer, do not use the 0 permit term.

Beginning August 2, 2006, the general permit Impacts-Channel screen will appear slightly different. DEQ will no longer be tracking stream impacts as perennial/intermittent, but rather as "stream bed". Therefore, the field name for perennial was changed to "Stream Bed / Perennial Linear Displacement (linear feet):" until the CEDS upgrades can be made and the backlog of entering permit authorization records can be caught up. When entering a permit authorization record under the old regulation scheme (as detailed in this guidance memorandum), complete both perennial/nonperennial linear displacement rows of data fields*. When entering a permit

authorization record under the new regulations, just use the "Stream Bed / Perennial Linear Displacement (linear feet):" row of fields*. The program assumes that the data entered this way represents all stream bed impacts whether perennial or nonperennial. Also, the Compensated field in both rows should contain the amount of compensation being received in linear feet for the permitted impact.

**It is not necessary to complete the Acreage field unless you want to use it to determine the permit application fee.*

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality Programs
Ellen Gilinsky, Ph.D., Director

P.O. Box 10009 Richmond, VA 23240-0009

Subject: Guidance Memorandum Number 06-2011
Water Permit Fee Program Procedures

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director
Valerie E. Thomson, Director, Administration Division
Terry Wagner, Director, Water Resources Division

Date: August 1, 2006

Copies: James Golden**,** Rick Weeks, Deputy Regional Directors, Regional Water Permit Managers, Regional Water Compliance Managers, Regional VWPP Managers, Regional Water Resources Managers, Amy Owens, Kyle Winter, Catherine Harold, Fred Cunningham, Francis Campbell, Carla Woods, Judy Newcomb, OWPP Staff, OGWWP Staff

Summary:
The 2004 General Assembly amended and reenacted § 62.1-44.15:6 of the Code of Virginia, which relates to water permit fee regulations. Based upon the amendments, the existing water fee regulation, 9 VAC 25-20, "Fees For Permits and Certificates", was modified, and the changes became effective on July 1, 2004. This guidance sets forth the procedures that are to be used in the administration of the water permit fee program. This guidance replaces Guidance Memorandum Number 03-2010, Procedures for Administering Refunds of Water Permit Fees, dated April 14, 2003.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at http://www.deq.virginia.gov/waterguidance/.

Contact information:
Please contact Burt Tuxford in the Office of Water Permit Programs at 804/698-4086 or brtuxford@deq.virginia.gov with any questions about the application of this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Water Permit Fee Program Procedures

Background

In 2002 the General Assembly amended § 62.1-44.15:6 of the Code of Virginia relating to water permit fee regulations. These amendments increased the existing water permit fees, and were intended to make the water permit program "self funding". The water permit fee regulation, 9 VAC 25-20, was modified to incorporate the amendments to the law, and the modification became effective on July 1, 2002. However, the increased permit fee provision of the law was set to expire on July 1, 2004. The 2004 General Assembly again amended and reenacted § 62.1-44.15:6 of the Code of Virginia, and made the increased fees permanent. The staff again modified the water permit fee regulation to incorporate the new amendments, and the changes became effective on July 1, 2004.

The purpose of this guidance is to assist the Division of Water Quality Programs staff and the Division of Water Resources staff with the implementation of the revised Water Permit Fee Regulation. A copy of the final regulation that was adopted by the Water Control Board on June 17, 2004 is available on DEQ's website at the following address:

http://www.deq.virginia.gov/vpdes/pdf/waterfeeregjuly2004.pdf

The major change to the law and regulation is for VPDES and VPA individual permits. The reapplication fee has been eliminated for these permits and replaced with an Annual Permit Maintenance Fee, which is to be paid by October 1st of each year.

Substantive Changes From The Former (pre 2004) Water Permit Fee Regulation

The substantive changes to the regulation are as follows:

(1) Added definitions for "major reservoir", "minor reservoir", and "single jurisdiction". Deleted the three "VWP Project Category" definitions.

(2) Clarified that permit application fees do not apply to farming operations engaged in production for market, or for maintenance dredging for federal navigation channels or other Corps of Engineers-sponsored dredging projects.

(3) Clarified that permit maintenance fees do not apply to facilities operating under a general permit, farming operations engaged in production for market, or for Virginia Water Protection, Surface Water Withdrawal, and Ground Water Withdrawal permits.

(4) Added information on late payments indicating that interest may be charged at the IRS underpayment rate, that a 10% late fee may apply for accounts over 90-days past due, and that the remedies available under the Code of Virginia apply for the collection of past due accounts.

(5) Modified the fees in the "permit application fees" and "permit modification fees" sections to be consistent with the changes to the Code of Virginia § 62.1-44.15:6.

(6) Added a section for "Annual Permit Maintenance Fees". These fees replace the fee to reapply for a permit for VPDES and VPA individual permits, and are due by October 1st of each year. Additional permit maintenance fees apply to facilities with more than 5 process wastewater discharge outfalls, and to facilities in a toxics management program.

(7) Added a section to allow discounted Permit Maintenance Fees for facilities participating in the Environmental Excellence Program (VEEP).

Water Permit Fee Program Procedures

The following procedures will be used in the administration of the Water Permit Fee program.

A. Payment Procedures

1. General Information

For purposes of the Water Permit Fee Regulation, the term "application" means the SWCB approved forms for applying for issuance or reissuance of a permit, certificate or special exception, or for filing a registration statement (VPDES and VPA) or application (VWP) for general permit coverage. Permit application fees must be submitted using the latest Permit Application Fee Form (effective July 1, 2004), which can be found on DEQ's website at the following address (and as Attachment D to this guidance):

http://www.deq.virginia.gov/vpdes/pdf/waterfeeformjuly2004.pdf

The fee schedule for each type of permit is listed on the back of the fee form.

For **VPDES and VPA permits**, application fees for new permits (and fees for major modifications) are due on the day an application is submitted. There is no application fee for a regularly scheduled renewal of an individual permit; **that fee has been replaced by the Annual Permit Maintenance Fee (see section A 4).** For a permit reissuance that occurs (and becomes effective) before the stated permit expiration date, the application fee is due on the day an application is submitted. If an application fee is not paid or is less than the required amount, the application is incomplete, and permit processing should not proceed until the required fee is paid. No permit will be reissued or automatically continued without payment of the required fee. There is no application fee for a major modification or amendment that is made at the Board's initiative.

For **SWW and GWW permits**, application fees (including those for major modifications or amendments) are due on the day an application is submitted. If the fee is not paid or is less than the required amount, the application is incomplete, and permit processing should not proceed until the required fee is paid. No permit will be automatically continued without payment of the required fee. There is no application fee for a major modification or amendment that is made at the Board's initiative.

For **VWP permit applications** (including major modifications), review of applications may be initiated before the fee is received; however, draft permits, permit authorizations or major modifications shall not be issued prior to payment of the required fee. There is no application fee for a major modification that is made at the Board's initiative.

Instructions for submitting permit fees are included on the fee form. The applicant should send the original check and original fee form to DEQ Receipts Control at the following address:

Department of Environmental Quality
Receipts Control
P. O. Box 10150
Richmond, VA 23240

Checks, drafts and money orders (payable to "Treasurer of Virginia") and, in the case of other state agencies, IAT's (as a credit to DEQ) are acceptable forms of payment. No cash will be accepted.

The Finance Office, upon receipt of a check and fee form, shall process the check, complete the deposit certificate and date information on the fee form, and send the form to the Regional Office.

An applicant should not use the old multi-colored fee form; however, the Regional Office may accept it so long as the current correct fee was submitted.

2. Procedures for Interagency Accounts (IAT's)

Regional/CO permit program offices should notify state agencies from which permit application fees are due that an Interagency Transfer (IAT) may be used. State agencies will have the choice of initiating an IAT or paying by check. Should a state agency contact the Regional Office, said agency should be directed to the CO Accounts Receivable Accounting Manager. When paying permit fees via IAT, state agencies must include DEQ's line of coding. See Attachment A for the appropriate coding for fees. A copy of the processed IAT and a copy of the fee form should be sent to DEQ Receipts Control. Payment is not considered received until the IAT is posted to the DEQ CARS 401 weekly report, and a copy of the processed IAT and a copy of the fee form are received by DEQ.

3. Checks Received by Regional/CO Permit Program Office

On occasion the applicant will deliver a payment directly to a Regional/CO permit office. When an original check for an application fee is received in a Regional/CO permit office, the check should be logged into the office's checks received log. These payments along with the ORIGINAL fee form should be sent daily to the CO Finance Office in order to expedite permit processing. (This process should be handled by the Office Manager.)

Regional Offices outside the Richmond area should send checks to Finance via a traceable delivery such as UPS, or by mail (using a blue security bag) to DEQ Receipts Control, P. O. Box 10150, Richmond, VA 23240. Regional/CO permit program offices in the Richmond area can use DEQ's internal delivery service to send checks to Finance.

Once checks have been received and deposited, Finance will indicate the deposit number and date on the Receipts Transmittal Log (RTL) which is filed in the Finance Office* and return a copy of this log to the Regional/CO permit program office. This will serve as a supporting document to the original log in the Regional/CO permit program office that the checks were received in Finance and deposited.

(* RTLs can be viewed online on DEQNet at the following address: http://deqnet/documents/index.asp?path=/docs/admin/admin_finance/ar_dailydcs)

4. Annual Permit Maintenance Fees

VPDES and VPA permittees must pay an Annual Permit Maintenance Fee (APMF) by October 1st of each year, beginning in 2004. Annual permit maintenance fees do not apply to: (1) VPDES and VPA facilities operating under a general permit; (2) permits pertaining to a farming operation engaged in production for market; and (3) Virginia Water Protection (VWP), Surface Water Withdrawal (SWW), and Ground Water Withdrawal (GWW) permits, certificates and special exceptions.

For the initial payment in October 2004, the date of July 1, 2004 was used to determine which facilities were subject to the maintenance fee (the date corresponds to the effective date of the revised fee regulation). All individual VPDES and VPA permit holders with

an effective permit as of July 1, 2004 (including permits that were administratively continued) were required to pay the permit maintenance fee to the Board by October 1st. For 2004 the permit maintenance fee did not apply if: (1) the permit was terminated prior to October 1, 2004; or (2) the permit holder applied or reapplied for a municipal minor VPDES permit with a design flow of 10,000 gallons per day or less between July 1, 2003 and July 1, 2004, and paid the applicable permit application fee.

Beginning in 2005 (and in each subsequent year) the fee determination date is April 1st. All individual VPDES and VPA permit holders with an effective permit as of April 1st (including administratively continued permits, and newly issued permits) are required to pay the permit maintenance fee to the Board by October 1st. Fee amounts are determined based upon the category the facility is in on April 1st. To be exempt from the annual fee, facilities must terminate their permit prior to April 1st.

If the billing category of a facility changes during the year, the category that the facility was (or will be) on April 1st will determine the APMF that the facility will pay that billing year. This also applies to facilities that switch from VPA permits to VPDES permits, and vice versa.

CEDS has been modified to allow billing information (including billing address, billing contact and phone number) and the appropriate fee amount to be input for each VPDES and VPA permit. This information MUST be entered (and kept up to date) for each existing and each new permittee. When a permit is reissued, the permit writer must ensure that the billing information in CEDS has transferred to the new "Active" permit and is correct and up to date.

The CO Finance Office uses the CEDS information to send out APMF bills to each permittee around the middle of August of each year. All bills are sent from and should be returned to DEQ Receipts Control in Richmond. All payments that are sent to the Regional Offices should be forwarded to Receipts Control using the procedures outlined in section A 3 above.

If the regional office receives a VPDES or VPA permit renewal application, and the permittee is not up to date with their APMF payments, the application is incomplete, and permit processing should not proceed until the required fee is paid. At this time, permit writers will need to check the latest Reconciliation Spreadsheet from the Finance Office and/or the Daily Receipt Transmittal Logs* (RTL) on DEQNet at:

http://deqnet/documents/index.asp?path=/docs/admin/admin_finance/ar_dailydcs

to determine the maintenance fee payment status for a particular permittee. To eliminate this step, CEDS will be modified in the future to link to the Oracle Financials system so that when a payment is recorded in the CARS financial database, the CEDS billing screen will be updated to show that the bill has been paid.

(* Note that electronic payments are shown on the DEQNet as a "Misc DC"; they are also reflected on the Reconciliation Spreadsheets.)

B. Determining Fee Amounts

1. General Information

The water permit fee regulation, 9 VAC 25-20, stipulates the permit application fee required for each category of water permit that DEQ issues. For all permits, within 14

days after receipt of a complete application (except VWP permits, which is 15 days), DEQ permit staff shall evaluate fee applicability. This applicability evaluation shall include: (1) whether the proposed activity requires coverage by a permit; (2) what specific permit coverage is required; and (3) whether the appropriate application fee has been received. If during the preparation of the draft permit it is determined that the status of the application has changed (for example from a minor to a major), the revised fee shall be required and must be submitted prior to the public notice of the permit.

For registration (VPDES and VPA) or application (VWP) for general permit coverage, the application fee for each category of water general permit that DEQ issues is stipulated in the water permit fee regulation, 9 VAC 25-20. General permit fees are no longer prorated based upon when permit coverage was issued. All general permit registrants or applicants pay the full fee amount regardless of when they apply for and are issued general permit coverage.

For VWP individual permits, the application fee for each type of project is stipulated in the water permit fee regulation, 9 VAC 25-20. The applicant will be notified of the fee due through an "additional information request" letter.

Annual Permit Maintenance Fee amounts are determined based on:

a. For billing year 2004: the billing category of the facility as of July 1, 2004;

b. For billing years 2005 and subsequent: the billing category of the facility as of April 1st in the corresponding billing year (e.g., April 1, 2005 for billing year 2005).

2. Deficiency Letters

Each Regional/CO permit program office will be responsible for generating deficiency letters when permit application fees are not paid in full or when a check is returned by the bank for insufficient funds. It is the CO Finance Office's responsibility to notify the program office when a check has been returned by the bank due to insufficient funds. The program office must notify the applicant of the check's return, the proper fee, and balance due by deficiency letter. The Regional Office shall provide a copy of the original fee form, with the DC#, to the applicant for use when submitting the additional fees. The applicant is to note the changes on the original fee form, then return the corrected fee form and the additional payment to DEQ Receipts Control, with copies to the program office. Copies of deficiency letters pertaining to permit fees should be sent to the Finance Office to identify incorrect payments received from applicants. Such deficiency letters should state that the application was deemed incomplete and processing will not resume until the proper fee is remitted.

For permit reissuances (other than VPDES and VPA permits), insufficient payment should be handled via Enforcement the same as with any other application deficiency. For VPDES and VPA permit reissuances, if the facility is not up-to-date with their APMF payments, then a deficiency letter should be generated, and permit processing should not resume until the proper fee is remitted.

The deficiency letter should direct payments to DEQ Receipts Control.

3. Revenue Refunds

During the permit application review phase if there is a determination that the amount paid is greater than the correct application fee, then a refund memo must be initiated by the Regional/CO permit program office. The following examples are the only cases where DEQ will process a full or partial refund of permit fees*:

(* Does NOT apply to Annual Permit Maintenance Fee refunds. For Annual Permit Maintenance Fee refunds, see section B 4.)

a. The VPDES or VPA general permit fee is determined to be less than the amount paid; or for VWP general permits, if a general permit determination changes to a "no permit required" (NPR) determination, or a mistake is made in determining the project's general permit fee (Note: if a VWP applicant "avoids/minimizes" after an application is submitted in order to change the amount of the fee, and VWP staff have spent time reviewing the application, the OWWP VWP Permit Program Manager may disapprove the refund request);

b. An incorrect fee amount is determined during the permit application review, including: duplicate payments; no application submitted with fee; a minor permit modification (which requires no fee); or one of the general permits which have no required fee;

c. Application review indicates that a facility or VWP project is in a fee category other than what the paid fee represents (e.g., the facility paid for a major, but rating sheet says that the source is a minor; or the facility paid for a minor without standard limits but qualifies for a minor with standard limits).

d. The application/registration is withdrawn within 90 days of receipt AND prior to being deemed administratively complete.

A refund of a permit fee must be initiated via the form included as Attachment B. This form must be completed and signed by a person in a position with delegated permit issuance and approval authority, and addressed to the DEQ Accounts Receivable Accounting Manager. A copy of the fee form, which identifies the payment and date of deposit must be attached to the refund memo.

Revenue refund requests should be sent for approval to:

VPDES & VPA permits:.....OWPP Water Permit Program Manager
VWP permits:.....OWWP VWP Permit Program Manager
SWW & GWW permits: .....Water Resources Division Director

Once the request has been received, reviewed, and approved by OWPP/OWWP/WR Div., the Finance staff will process the revenue refund and maintain the supporting documentation from the Regional/CO permit program office. Refund requests that are not approved will be sent back to the requesting office.

4. Annual Permit Maintenance Fee Changes/Refunds

Changes and/or refunds may occasionally be necessary for the APMFs that are billed to a facility. Once invoices have been sent for a particular billing year (usually around the middle of August), all requested APMF changes must be submitted on the VPDES/VPA Annual Maintenance Fee Change Form (see Attachment C). Changes that do not involve a refund should be signed by the regional Water Permit Manager. If the change involves

a refund, then the form must be signed by a person in a position with delegated permit issuance and approval authority.

All change forms are to be sent to the OWPP Water Permit Fee Coordinator. Once the request has been reviewed, and approved by OWPP, the forms will be sent to the DEQ Accounts Receivable Accounting Manager, and the Finance staff will process the change/refund. Change/refund requests that are not approved will be sent back to the requesting office.

C. Reporting and Reconciling

1. Finance Office Procedures

   The Finance Office will be responsible for recording all checks received in a receipts transmittal log and making deposits on a daily basis. The deposit number and date will be noted on each receipts transmittal log and this information will be used to enter the deposits into the Commonwealth Accounting and Reporting System (CARS).

   The Finance staff will distribute a copy of the check and a copy of the permit application fee form to the appropriate Regional/CO permit program offices daily. A copy of the application fee form will note the deposit number and date. The Finance staff will distribute copies of revenue refund transaction vouchers to the Regional/CO permit program offices as refunds are processed**.**

2. Reconciliation Procedures

   The Finance Office will be responsible for reconciling daily deposits to the weekly CARS reports. The Finance Office will be responsible for reconciling the receipts transmittal log maintained in the Finance Office to revenues reported in the monthly CARS reports. The Finance staff will also be responsible for verifying accuracy of revenue refunds on the weekly and monthly CARS reports.

   Each Regional/CO permit program office must work with the Finance staff to reconcile fee receipts monthly. Each Regional/CO permit program office must ensure that checks received directly by the Regional/CO permit program office were received and deposited by the Finance Office. This can be accomplished by comparing the copies of the receipts transmittal log distributed by Finance that include deposit numbers and dates with the checks received log maintained in each individual office.

Attachments:

A - IAT Coding Information
B - Permit Fee Refund Form
C - VPDES/VPA Annual Maintenance Fee Change Form
D - Permit Application Fee Form

ATTACHMENT A

To: Agencies and Institutions of the Commonwealth of Virginia

From: Carla M. Woods
Fiscal Director

Subject: Permit Fees Payable to the Department of Environmental Quality

Permit Fees, Registration Fees, and Annual Maintenance Fees which are due to the Department of Environmental Quality (DEQ) from state agencies may be paid by check or Interagency Transfers (IAT). A copy of the processed IAT water permit application fee form should be sent to:

DEQ Receipts Control
P.O. Box 10150
Richmond, VA 23240

The appropriate lines of coding for DEQ fees are:

WATER PERMIT FEES:

	Trans	Agency	Cost Code	Fund/Detail	Revenue Source
Annual Maintenance Fees:	136	440	603	0914	02071
All Other Water Fees:	136	440	603	0914	02401

Questions regarding these procedures should be addressed to Judy Newcomb at (804) 698-4162 or jenewcomb@deq.virginia.gov

ATTACHMENT B

SUBJECT: Permit Fee Refund Request

TO: DEQ Accounts Receivable Accounting Manager

FROM: Deputy Regional Director

DATE:

Name of source that made the original payment: _____

Permit Number of source that made the original request: _____

Permit Type: _____

Name and address of the source to which a refund should be made payable:

_____

_____

_____

Federal identification number of the source to whom the refund should be made: _____

DEQ deposit certificate (DC) number and date of the original payment:

DC Number: _____ DATE: _____

Amount of original payment: _____

Amount recommended to be refunded: _____

Date application or registration form received: _____

Basis for the proposed refund: [*check at least one of the following and explain in detail why a refund is appropriate in an attached Memorandum with copies of the check and Fee Form from applicant. All requests that are incomplete will be disapproved and returned.*]

____ the General Permit fee is determined to be less than the amount paid.

____ an incorrect fee amount is determined during the 90 day application review.

____ a duplicate payment was made. Copies of all payments and fee forms must accompany the refund request.

____ no application submitted with fee.

____ the General permit has no required fee.

____ the application was withdrawn within 90 days of application receipt date.

____ other: explain in Memorandum

Attachments: Memorandum
Copy of Fee Form
Copy of Check

OWPP/OWWP/WR Div. ACTION: ☐ Approved ☐ Denied

Signature: _____ Date: _____

OWPP/OWWP Permit Manager or WR Div. Director

ATTACHMENT C

DEPARTMENT OF ENVIRONMENTAL QUALITY
VPDES/VPA Annual Maintenance Fee Change Form

Registration/Permit Number: ______________________ Date: ______________

Company Name: ____

Company Address: ____

____

Contact Person: ____

ACTION: ☐ Additional Fee ☐ Refund Amount $ ____________

☐ Other (see below) (see reason below)

- -

☐ **Change Annual Fee Category and/or Annual Fee Amount**

Old Category ______________________________ Old Fee Amount ____________

New Category ______________________________ New Fee Amount ____________

☐ **Toxics Management Program**

☐ Add TMP to bill (+ $1000)

☐ Delete TMP from bill (- $1000)

☐ **More Than 5 Process Outfalls**

☐ Add More Than 5 Process Outfalls to bill (+ $1000)

☐ Delete More Than 5 Process Outfalls from bill (- $1000)

☐ **Other Changes** (Specify):

____

____

____

____

____

____

Signature: ______________________________ Date: ____________
Regional Office Representative

OWPP ACTION: ☐ Approved ☐ Denied

Signature: ______________________________ Date: ____________

ATTACHMENT D

DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER QUALITY DIVISION
PERMIT APPLICATION FEE FORM
EFFECTIVE JULY 1, 2004

INSTRUCTIONS

Applicants for individual Virginia Pollutant Discharge Elimination System (VPDES), Virginia Pollution Abatement (VPA), Virginia Water Protection (VWP), Surface Water Withdrawal (SWW), and Ground Water Withdrawal (GWW) Permits are required to pay permit application fees, except farming operations engaged in production for market. Fees are also required for registration for coverage under General Permits except for the general permits for sewage treatment systems with discharges of 1,000 gallons per day (GPD) or less and for Corrective Action Plans for leaking underground storage tanks. Except for VWP permits, fees must be paid when applications for permit issuance, reissuance* or modification are submitted. Applicants for VWP permits will be notified by the DEQ of the fee due. Applications will be considered incomplete if the proper fee is not paid and will not be processed until the fee is received. (* - the reissuance fee does not apply to VPDES and VPA permits - see the fee schedule included with this form for details.)

The permit fee schedule is included with this form. Fees for permit issuance or reissuance and for permit modification are included. Once you have determined the fee for the type of application you are submitting, complete this form. The original copy of the form and your check or money order payable to "Treasurer of Virginia" should be mailed to:

Department of Environmental Quality
Receipts Control
P.O. Box 10150
Richmond, VA 23240

A copy of the form and a copy of your check or money order should accompany the permit application. You should retain a copy for your records. Please direct any questions regarding this form or fee payment to the DEQ Office to which you are submitting your application.

APPLICANT NAME: _____ **SSN/FIN:** _____

ADDRESS: _____ **DAYTIME PHONE: (_____)** _____
Area Code

_____

_____

FACILITY/ACTIVITY NAME: _____

LOCATION: _____

TYPE OF PERMIT APPLIED FOR
(from Fee Schedule): _____

TYPE OF ACTION: _____ **New Issuance** _____ **Reissuance** _____ **Modification**

AMOUNT OF FEE SUBMITTED
(from Fee Schedule): _____

EXISTING PERMIT NUMBER (if applicable): _____

DEQ OFFICE TO WHICH APPLICATION SUBMITTED (check one)

☐ Abingdon/SWRO	☐ Harrisonburg/VRO	☐ Woodbridge/NVRO	☐ Lynchburg/SCRO
☐ Richmond/PRO	☐ Richmond/Headquarters	☐ Roanoke/WCRO	☐ Virginia Beach/TRO

FOR DEQ USE ONLY
Date: _____
DC #: _____

Original Form and Check - DEQ Receipts Control, Richmond
Copy of Form and Copy of Check - DEQ Regional Office or Permit Program Office

FEE SCHEDULES

A. VPDES and VPA Permits. Applications for issuance of new individual VPDES or VPA permits, and for permittee initiated major modifications that occur (and become effective) before the stated permit expiration date. (Flows listed are facility "design" flows. Land application rates listed are facility "design" rates.) [NOTE: VPDES and VPA permittees pay an Annual Permit Maintenance Fee instead of a reapplication fee. The permittee is billed separately by DEQ for the Annual Permit Maintenance Fee.]

TYPE OF PERMIT	ISSUANCE	MODIFICATION
VPDES Industrial Major	$24,000	$12,000
VPDES Municipal Major	$21,300	$10,650
~~VPDES Municipal Major Stormwater / MS4~~ *These permits are now issued by DCR.*	~~$21,300~~	~~$10,650~~
VPDES Industrial Minor / No Standard Limits	$10,200	$5,150
VPDES Industrial Minor / Standard Limits	$3,300	$3,300
VPDES Industrial Stormwater	$7,200	$3,600
VPDES Municipal Minor / Greater Than 100,000 GPD	$7,500	$3,750
VPDES Municipal Minor / 10,001 GPD - 100,000 GPD	$6,000	$3,000
VPDES Municipal Minor / 1,001 GPD - 10,000 GPD	$5,400	$2,700
VPDES Municipal Minor / 1,000 GPD or Less	$2,000	$1,000
~~VPDES Municipal Minor Stormwater / MS4~~ *These permits are now issued by DCR.*	~~$2,000~~	~~$1,000~~
VPA Industrial Wastewater Operation / Land Application of 10 or More Inches Per Year	$15,000	$7,500
VPA Industrial Wastewater Operation / Land Application of Less Than 10 Inches Per Year	$10,500	$5,250
VPA Industrial Sludge Operation	$7,500	$3,750
VPA Municipal Wastewater Operation	$13,500	$6,750
VPA Municipal Sludge Operation	$7,500	$3,750
All other VPA operations not specified above	$750	$375

B. Virginia Water Protection (VWP) Permits. Applications for issuance of new individual, and reissuance or major modification of existing individual VWP permits. Only one permit application fee will be assessed per application; for a permit application involving more than one of the operations described below, the governing fee shall be based upon the primary purpose of the proposed activity. (Withdrawal amounts shown are maximum daily withdrawals.)

TYPE OF PERMIT	ISSUANCE/REISSUANCE	MODIFICATION
VWP Individual / Surface Water Impacts (Wetlands, Streams and/or Open Water)	$2,400 plus $220 for each 4,356 sq. ft. (1/10 acre) (or portion thereof) of incremental impact over 87,120 sq. ft. (two acres) ($60,000 maximum)	$1,200 plus $110 for each 4,356 sq. ft. (1/10 acre) (or portion thereof) of incremental impact over 87,120 sq. ft. (two acres) ($30,000 maximum)
VWP Individual / Minimum Instream Flow - Withdrawals equal to or greater than 3,000,000 gallons on any day	$25,000	$5,000
VWP Individual / Minimum Instream Flow - Withdrawals between 2,000,000 and 2,999,999 gallons on any day	$20,000	$5,000
VWP Individual / Minimum Instream Flow - Withdrawals between 1,000,000 and 1,999,999 gallons on any day	$15,000	$5,000
VWP Individual / Minimum Instream Flow - Withdrawals < 1,000,000 gallons on any day that do not otherwise qualify for a general VWP permit for water withdrawals	$10,000	$5,000
VWP Individual / Reservoir - Major	$35,000	$12,500
VWP Individual / Reservoir - Minor	$25,000	$12,500
VWP Individual/Nonmetallic Mineral Mining	$2,400 plus $220 for each 4,356 sq. ft. (1/10 acre) (or portion thereof) of incremental impact over 87,120 sq. ft. (two acres) ($7,500 maximum)	$1,200 plus $110 for each 4,356 sq. ft. (1/10 acre) (or portion thereof) of incremental impact over 87,120 sq. ft. (two acres) ($3,750 maximum)

C. Surface Water Withdrawal (SWW) and Ground Water Withdrawal (GWW) Permits. Applications for issuance of new individual, and reissuance or major modification of existing individual SWW permits or GWW permits.

TYPE OF PERMIT	ISSUANCE/REISSUANCE	MODIFICATION
Surface Water Withdrawal	$12,000	$6,000
Ground Water Withdrawal / Initial Permit for an Existing Withdrawal Based Solely on Historic Withdrawals	$1,200	$600
Ground Water Withdrawal	$6,000	$3,000

D. Registration Statements <u>(VPDES and VPA permits) or Applications (VWP permits)</u> for General Permit Coverage.

1. Except as specified in 2, 3, 4 and 5 below, the fee for registration for coverage under a general permit is $600.

2. General VPDES Permit for Domestic Sewage Discharges of Less Than or Equal to 1,000 GPD (9 VAC 25-110) = $0.
General VPDES Permit Regulation for Discharges From Petroleum Contaminated Sites (9 VAC 25-120) = $0.

3. VWP General Permit:

TYPE OF PERMIT	ISSUANCE
VWP General / Less Than 4,356 sq. ft. (1/10 acre) of Surface Water Impact (Wetlands, Streams and/or Open Water)	$0
VWP General / 4,356 sq. ft. to 21,780 sq. ft. (1/10 acre to 1/2 acre) of Surface Water Impact (Wetlands, Streams and/or Open Water)	$600
VWP General / 21,781 sq. ft. to 43,560 sq. ft. (greater than 1/2 acre to one acre) of Surface Water Impact (Wetlands, Streams and/or Open Water)	$1,200
VWP General / 43,561 sq. ft. to 87,120 sq. ft. (greater than one acre to two acres) of Surface Water Impact (Wetlands, Streams and/or Open Water)	$1,200 plus $120 for each 4,356 sq. ft. (1/10 acre) (or portion thereof) of incremental impact over 43,560 sq. ft. (one acre) ($2,400 maximum)
VWP General / Minimum Instream Flow / Reservoir - Water withdrawals and/or pond construction	$2,400

4. VPDES Storm Water General Permits (except as specified in 5 below):

TYPE OF PERMIT	ISSUANCE
VPDES General / Industrial Storm Water Management	$500
~~VPDES General / Storm Water Management - Phase I Land Clearing ("Large" Construction Activity - Sites or common plans of development equal to or greater than 5 acres)~~ *These permits are now issued by DCR.*	~~$500~~
~~VPDES General / Storm Water Management - Phase II Land Clearing ("Small" Construction Activity - Sites or common plans of development less than 5 Acres)~~ *These permits are now issued by DCR.*	~~$300~~

5. Owners of facilities that are covered under the Industrial Activity (VAR5) and Construction Site (VAR10) storm water general permits that expire on June 30, 2004, and who are reapplying for coverage under the new general permits that are effective on July 1, 2004, must submit a fee of $600 to reapply.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Division of Enforcement

Memorandum

SUBJECT: Guidance[1] Memorandum DE-05-001
Notices of Alleged Violation (NOAVs): Formats and Processes for Warning Letters and Notices of Violation

TO: Regional Directors, Division Directors

FROM: Amy Owens, Director

DATE: October 26, 2005

Cc: Deputy Regional Directors, Regional Enforcement Representatives, Regional Compliance Auditors, Central Office Enforcement Managers, Central Office Compliance Managers, Rick Linker, Melissa Porterfield, Sharon Baxter, Sharon Brown

Summary and Purpose

On July 1, 2005, Senate Bill 1089[2] went into effect, codifying certain requirements for "notices of alleged violation" ("NOAVs"). NOAVs are written communications of the Department of Environmental Quality ("Department" or "DEQ") that recite observed facts and legal requirements and that allege violations of laws, regulations, permit conditions, orders, or enforceable certification documents. NOAVs include both Warning Letters and Notices of Violation ("NOVs").

In relevant part, the Virginia Code now states that the issuance of a NOAV by the Department is **not a case decision**[3] as defined in Va. Code § 2.2-4001. The Code does require, however, that NOAVs include the following:

- a description of *each* violation;
- the specific provision of law (or regulation, permit condition, etc.) violated; and
- information on the process for obtaining a final decision or fact finding from the Department on whether or not a violation has occurred.[4]

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[1] Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. Guidance documents do not establish or affect legal rights or obligations; do not establish a binding norm; and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations and policies of the Commonwealth to case-specific facts.

[2] Upon enactment into law, Senate Bill 1089 became 2005 Acts Chapter 706. The new requirements for NOAVs have been codified at Va. Code §§ 10.1-1309 (A) (vi) (air); 10.1-1455 (G) (waste); and 62.1-44.15 (8a) (water).

[3] A NOAV should not state that a facility "has violated" or "is in violation of" a standard or regulation, because that may imply incorrectly that a case decision has been made.

Senate Bill 1089 also required the Director to develop and implement a Process for Early Dispute Resolution ("PEDR") and to make it "available after the issuance of a notice of alleged violation or other notice of deficiency issued by the Department." The legislation continues: "[I]nformation on the [PEDR] shall be provided to the public and to facilities potentially impacted by the provisions of this act." The PEDR has been published on the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf.[5]

In response to the legislative change, this guidance provides updated formats for Warning Letters and NOVs and the processes associated with their issuance. To that extent, it supersedes previous guidance.[6] This guidance does not address the severity categories of specific violations under the various media programs (*e.g.*, whether a violation would constitute a high-priority violation or significant non-compliance). Nor does this guidance address mobile sources.

The formats in this guidance are designed to meet the requirements of Senate Bill 1089 for NOAVs and to be easy to use and understand. This guidance includes both sample format letters and standard format paragraphs for both Warning Letters and NOVs, which are very similar. The format letters and paragraphs have citations to appropriate authorities for various media. The sample letters in this guidance use factual allegations taken from past DEQ cases to illustrate how certain *kinds* of fact patterns might be represented (*e.g.*, inspection results, emissions tests, discharge monitoring reports). The presentation of the observations and legal requirements in the Warning Letter or NOV may vary slightly depending on the fact pattern. Nevertheless, DEQ staff and management **must** assure that any Warning Letter or NOV meets the NOAV requirements of Senate Bill 1089, described above.

Issuance, response, and resolution of Informal Corrections and NOAVs should be documented both to the file and to appropriate tracking system (*e.g.*, CEDS).

It is DEQ's policy to encourage and facilitate correction of alleged violations as early and quickly as possible.

Informal Correction vs. Warning Letter vs. Notice of Violation

Informal Correction: When a minor violation can be corrected in **30 days or less**, and unless otherwise precluded by law or policy,[7] staff may use Informal Correction to secure compliance from a regulated party.

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[4] The Act reinforces this by stating: "[N]othing in this section shall preclude an owner from seeking such a determination."

[5] The requirement for a PEDR is in clause 2 (at the end) of 2005 Acts c. 706. It is not part of a numbered statute and will not be published in the Virginia Code.

[6] In particular, this guidance supersedes Chapter 2, Sections I (A) through I (C) of the December 1, 1999 Enforcement Manual and the related attachments for Warning Letters and NOVs.

[7] Program-specific policies may dictate the use of other, specific mechanisms.

As its name implies, this method is appropriate when a minimal amount of effort is required to secure compliance. Situations that meet all of the following criteria may be appropriate for Informal Correction:

- Deficiencies that can be corrected within 30 days;
- Alleged violations that do not present a threat to human health or the environment;
- Alleged violations that are not substantial deviations from fundamental components of the regulatory program; and
- Facilities/regulated parties that are infrequent violators.

Informal Correction is not appropriate for high-priority violations or significant non-compliance, as defined in the media guidance.

Using Informal Correction, staff detecting the alleged violation communicates their discovery to the responsible official *promptly* using informal means (onsite conversation, fax, telephone, email, multi-part form, or letter). In turn, the responsible official should promptly inform the staffer what is being done to remedy the noncompliance and when corrective action will be completed. Verification that the corrective action has been completed should be provided by the responsible official *in writing or email.* Onsite verification by staff is highly desirable, if resources allow.

If the responsible official fails to be *promptly* cooperative/receptive to the Informal Correction approach, staff should proceed directly to issuance of a Warning Letter.

Warning Letter: Warning Letters are the appropriate response following the discovery of the majority of alleged violations. The fundamental premise underlying the Warning Letter is that if the facility's corrective action response to the Warning Letter is both satisfactory and timely, then the case can be disposed of *without penalty.*

If the situation is not suitable for Informal Correction, then a Warning Letter will likely be appropriate. If the alleged violation falls into one of the NOV-appropriate categories detailed in the next section, however, then a Warning Letter should not be used, and a NOV should be issued.

The Warning Letter should require that the regulated party respond within **20 days of the date of the letter**[8] either verifying corrective action, or providing a plan and schedule for corrective action. A meeting may be necessary. Presuming that the regulated party's proposal is acceptable:

- No further action memorializing the plan and schedule need be undertaken if corrective action will take **90 days or less,** except for DEQ acknowledgment.

[8] Warning Letters and NOVs should articulate a date by which the regulated party is to respond, and avoid stating new, extended dates for compliance. Several Virginia courts have interpreted new compliance dates in these kind letters as extensions granted by the Department, thereby restarting the "compliance clock."

- If corrective action will take a **year or less**, then a Letter of Agreement[9] memorializing the plan and schedule is appropriate, provided the regulated party is cooperative, does not have a history of noncompliance and is not asking for relief from environmental compliance requirements during the course of the corrective action.
- If corrective action will take **longer than a year**[10], or if the regulated party is seeking interim relief from environmental compliance requirements during the course of corrective action, or if there is some documented reason to not have full confidence in the regulated party's ability/commitment to fully perform the corrective action schedule in a timely manner, then a consent order should be used to memorialize the plan and schedule.

In the event that the regulated party fails to adequately respond to the Warning Letter within **30 days of the date of the letter,** then a Notice of Violation should be issued.[11]

Notice of Violation: A NOV signals that the alleged noncompliance is chronic or acute or of such significance that a case is appropriate for enforcement action and that a penalty may be warranted. NOVs should be issued for any of the following:

- **Chronic** noncompliance, including: repeated or continuing alleged violations by the regulated party despite previous compliance activity;
- **Acute** noncompliance, including: a violation which has substantial potential to or has already impacted human health and/or the environment; a substantive violation of an administrative or judicial order; a violation of an essential program element like failure to report an oil spill or failure to report a statistically significant ground water exceedance in a landfill's monitoring program;
- **EPA Priority** noncompliance, including: High Priority Violations (HPV) in the Air Program; Significant Noncompliers (SNC) in the Hazardous Waste Program; and Significant Noncompliance (SNC) in the Water Program;
- **Seasonal Violations** that need to be elevated quickly to ensure that corrective action is timely; or
- **Other noncompliance** as identified in media-specific guidance, or failure to respond appropriately to a Warning Letter.

NOVs instruct the regulated party to contact DEQ within 10 days of the date of the letter in order to set up a meeting to discuss the alleged violations and discuss next steps, including the possibility of a consent order and penalties.

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[9] A Letter of Agreement is not an enforcement mechanism recognized in the Virginia Code, and therefore is not enforceable as such. However, a Letter of Agreement does provide a clear record that a regulated party understood its environmental compliance responsibilities. *See* Va. Code § 10.1-1186 (2).

[10] Where a regulated party is fully cooperative in response to a Warning Letter, but needs a Consent Order to accommodate a corrective action schedule of more than a year, it is appropriate to include a notation of the facility's cooperation at the end of the "Findings of Fact/Conclusions of Law" section of the consent order.

[11] Note: under program-specific guidance, staff in the Water Program issue Warning Letters for each point in the Compliance Auditing System, unless other, more serious actions are taken.

If alleged noncompliance is ongoing, ideally NOVs should be issued monthly for repetitive or continuing violations until a resolution is achieved. If resources preclude this frequency, then NOVs should be issued at least quarterly for such violations, to avoid the erroneous appearance that facility compliance is not a Department priority and/or that the violation is not serious.

NOAV Format, Content, and Delivery

How to use the NOAV samples and formats. Attached to this guidance are a sample Warning Letter (Attachment 1), sample NOVs for Air, Waste and Water (Attachments 2, 3, and 4), and tables of format paragraphs with references to appropriate authorities (Attachment 5). Since Warning Letters and NOVs are both NOAVs, they are very similar in information and structure. This approach facilitates a user-friendly "cut and paste" approach to assembling the letters and notices, thereby saving staff time. The attached sample letters and tables of interchangeable paragraphs are intended to demonstrate how various types of information (*e.g.*, inspections, data sets, compliance history) might be represented in the body of either a Warning Letter or a NOV. Any DEQ staff with proper authorization from his or her Regional Director can sign a NOAV.

Necessary content: The sample letters show how to satisfy Senate Bill 1089's requirements for: (1) a description of each alleged violation; and (2) the corresponding, specific provision of law, etc., that may have been violated. These two elements are set out in the section of the NOAV entitled: "Observations and Legal Requirements." Each alleged violation is numbered, and separate paragraphs under the number are used for the observations and the legal requirements. The observations lay out the observed facts that underlie an alleged violation. The legal requirements itemize the citation for each violation. To ensure that these elements are present, observations are labeled and in standard font; legal requirements are separately labeled and set in **boldface.** If a table is used, legal requirements are presented in a **boldfaced,** labeled column in the table with clear references to the specific legal authority. It must be clear to any reviewer that both observations and legal requirements are included and are separately identified for each alleged violation, and that a specific provision has been cited for each legal requirement.

Senate Bill 1089 also requires: (1) that information be provided to parties about the process for obtaining a final decision or fact finding from the Department on whether or not a violation has occurred; and (2) that information about the PEDR be provided to facilities potentially impacted by the act. Included language referring to DEQ's new PEDR policy meets these conditions. Finally, Senate Bill 1089 provides that NOAVs are not "case decisions" – this is covered in the samples' introductory paragraphs.

Other attachments: It is always desirable to attach materials to a NOAV which support/clarify the Department's position and enhance the regulated party's understanding. These materials can include inspection reports, photographs, maps and copies of relevant regulation or law. To assure clarity, it is ordinarily best not to address alleged violations at more than one facility in a NOAV.

Delivery and certified mail: It is important to ensure that delivery of NOAVs has been successful. In the past, some media have consistently used certified mail for all NOVs. Though use of certified mail is strongly preferred because of the certainty it provides, this approach can be very expensive, and it is therefore recommended at a minimum that certified mail and other receipt-generating delivery methods be employed strategically when effective delivery is uncertain. For the majority of correspondence, staff will know that first class mail has sufficed as they will be contacted by the regulated party as per the instructions in the Warning Letter or NOV. If no response has been received for 30 days from the date of the letter, resending the NOAV certified mail is appropriate. If a regulated party fails to accept or pick up certified mail, other means of providing notice, such as service of process, hand-delivery, or Federal Express Delivery permitting drop off at the registered agent's address might be effective. Staff should discuss an appropriate course with Central Office enforcement in this situation. It is also appropriate to send copies of NOAVs to several different persons besides the responsible official (*e.g.*, registered agent, board of supervisors) to ensure/have evidence that NOAVs have reached facility decision makers.

NOAV Challenges and Corrections

In the event that a regulated party demonstrates that a NOAV is clearly erroneous in part or in whole, then a clarifying letter should be sent to the facility, either correcting and reissuing the NOAV, or indicating that no further DEQ action is warranted on the NOAV, as appropriate.[12] Though NOAVs are not case decisions, they are representative of the Department's perception of facility conditions, and should therefore be accurate. Further, as NOVs are frequently reported to EPA as part of grant commitments, and are in turn noted in EPA databases, it is important that these records be as accurate as possible.

In the event that DEQ staff and a regulated party disagree as to interpretations of fact or law, the regulated party can elevate the discussion to agency management via the PEDR.

Questions

Questions regarding this guidance or its application should be directed to appropriate Central Office enforcement staff.

[12] NOAV correction is very unusual, and is only appropriate when the NOAV as issued was wrong – it is not to be used as a negotiation tool or where there are genuine disagreements as to interpretation of facts or law.

ATTACHMENT 1 - SAMPLE WARNING LETTER (UNDERGROUND STORAGE TANK COMPLIANCE)

Month 00, 2005

CERTIFIED MAIL **(Recommended)**
Return Receipt Requested

Mr. John Sample
Sample Enterprises, Inc.
1 Sample Lane
Sample, Virginia 00000

WARNING LETTER

RE: WL No. 00-00-RO-000
Sample Enterprises, Inc., Complianceville Station, Registration No. 0000

Dear Mr. Sample:

The Department of Environmental Quality ("DEQ" or "the Department") has reason to believe that the Complianceville Station may be in violation of the State Water Control Law and Regulations.

This letter addresses conditions at the facility named above, and also cites compliance requirements of the State Water Control Law and Regulations. Pursuant to Va. Code § 62.1-44.15 (8a), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq*. The Department requests that you respond **within 20 days of the date of this letter.**

OBSERVATIONS AND LEGAL REQUIREMENTS

On July 20, 2005, DEQ staff conducted a formal inspection of the underground storage tanks (USTs) at Sample Enterprise, Inc.'s Complianceville Station. File and UST registration documents were also reviewed. The inspection checklist is attached. The following describe the staff's factual observations and identify the applicable legal requirements:

1. *Observations:* Tank release detection test results for tanks # 2, 3, and 4 were not provided during the inspection.

   Legal Requirements: **9 VAC 25-580-160 requires an owner or operator to use appropriate release detection methods.**

2. *Observations:* Line and leak detector release detection test results were not provided during the inspection for all three piping and leak detectors associated with tanks # 2, 3, and 4.

   ***Legal Requirements:* 9 VAC 25-580-140 (2) (a) (2) requires an owner or operator to test line tightness annually. 9 VAC 25-580-170 (1) requires an owner or operator to test line release detection annually.**

3. *Observations:* Financial assurance documents were not available for review during the inspection.

   ***Legal Requirements:* 9 VAC 25-590-150 (E) requires an owner or operator to submit evidence of financial assurance as described in 9 VAC 25-590-160.**

ENFORCEMENT AUTHORITY

Va. Code § 62.1-44.23 of the State Water Control Law provides for an injunction for any violation of the State Water Control Law, any State Water Control Board rule or regulation, an order, permit condition, standard, or any certificate requirement or provision. Va. Code §§ 62.1-44.15 and 62.1-44.32 provide for a civil penalty up to $32,500 per day of each violation of the same. In addition, Va. Code § 62.1-44.15 authorizes the State Water Control Board to issue orders to any person to comply with the State Water Control Law and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the State Water Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 62.1-44.32 (b) and 62.1-44.32 (c) provide for other additional penalties.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

FUTURE ACTIONS

After reviewing this letter, please respond in writing to DEQ **within 20 days of the date of this letter** detailing actions you have taken or will be taking to ensure compliance with state law and regulations. If corrective action will take longer than 90 days to complete, you may be asked to sign a Letter of Agreement or enter into a Consent Order with the Department to formalize the plan and schedule. *It is DEQ policy that appropriate, timely corrective action undertaken in response to a Warning Letter will avoid adversarial enforcement proceedings and the assessment of civil charges or penalties.*

Please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in

DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution, please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below.

Your contact at DEQ in this matter is Environmental Staffer. Please direct written materials to her attention. If you have questions or wish to arrange a meeting, you may reach her directly at (000) 000-0000 or eestaffer@deq.virginia.gov.

Sincerely,

Sam Hardtack
Water/UST Enforcement Manager

cc: CASE FILE
SPECIALIST
MEDIA MANAGER

ATTACHMENT 2 - SAMPLE NOV (SUBMITTED AIR DATA REVIEW)

Month 00, 2005

CERTIFIED MAIL **(Recommended)**
Return Receipt Requested

Mr. John Sample
Sample Enterprises, Inc.
1 Sample Lane
Sample, Virginia 00000

NOTICE OF VIOLATION

RE: NOV No. 00-00-RO-000
Sample Enterprises, Inc., Complianceville Facility, Permit No. 0000

Dear Mr. Sample:

This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the Air Pollution Control Law and Regulations.

This letter addresses conditions at the facility named above, and also cites compliance requirements of the Air Pollution Control Law and Regulations. Pursuant to Va. Code § 10.1-1309 (A) (vi), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq.* The Department requests that you respond **within 10 days of the date of this letter.**

OBSERVATIONS AND LEGAL REQUIREMENTS

On March 2 and 3, 2005, Happy Environmental Testing, Inc. of Happy, NC conducted quantitative tests for particulate emissions from the three (3) Converta Kiln boilers at the Sample Enterprises, Complianceville facility. Stack test results were received by the Verybest Regional Office of DEQ on March 24, 2005. The following describe the staff's factual observations (stack test results) and identify the applicable legal requirements.

Boiler No.1 low load	**TEST**	**Legal Requirements***
PM, lb/hr (unit No. 1 low load)	5.442	**4.72**
PM, lb/MMBtu (unit No. 1 low load)	0.2882	**0.16**

Boiler No.2 low load	TEST	Legal Requirements*
PM, lb/hr (unit No. 2 low load)	13.267	**4.72**
PM, lb/MMBtu (unit No. 2 low load)	0.576	**0.16**

Boiler No.3 low load	TEST	Legal Requirements*
PM, lb/hr (unit No. 3 low load)	4.347	**4.72**
PM, lb/MMBtu (unit No. 3 low load)	0.2335	**0.16**

Boiler No.1 high load	TEST	Legal Requirements*
PM, lb/hr (unit No. 1 high load)	9.46	**4.72**
PM, lb/MMBtu (unit No. 1 high load)	0.7637	**0.16**

Boiler No.2 high load	TEST	Legal Requirements*
PM, lb/hr (unit No. 2 high load)	9.003	**4.72**
PM, lb/MMBtu (unit No. 2 high load)	0.1574	**0.16**

Boiler No.3 high load	TEST	Legal Requirements*
PM, lb/hr (unit No. 3 high load)	7.505	**4.72**
PM, lb/MMBtu (unit No. 3 high load)	0.2381	**0.16**

***Permit condition No. 20 of the facility permit of May 31, 2002 (as amended September 4, 2003) New Source Review Permit and permit condition No. IV. 6 of April 23, 2003 Virginia Title V Operating Permit limits particulate emissions to 4.72 lb/hr per unit and 0.16 lbs/MMBtu.**

***9 VAC 5-170-160 (A) – (Conditions on Approvals) of the Commonwealth of Virginia State Air Pollution Control Board Regulations for the Control and Abatement of Air Pollution states in part: "The board may impose conditions upon permits and other approvals which may be necessary to carry out the policy of the Virginia Air Pollution Control Law, and which are consistent with the regulations of the board. Except as otherwise specified, nothing in this chapter shall be understood to limit the power of the board in this regard. If the owner or other person fails to adhere to the conditions, the board may automatically cancel the permit or approvals. This section shall apply, but not be limited, to approval of variances, approval of control programs, and granting of permits."**

***Va. Code § 10.1-1322 (A) gives the Department the authority to issue, amend, revoke or terminate and reissue permits, and failure to comply with any condition of a permit is considered a violation of the Air Pollution Control Law.**

ENFORCEMENT AUTHORITY

Va. Code § 10.1-1316 of the Air Pollution Control Law provides for an injunction for any violation of the Air Pollution Control Law, the Air Board regulations, an order, or permit

condition, and provides for a civil penalty up to $32,500 per day of each violation of the Air Pollution Control Law, regulation, order, or permit condition. In addition, Va. Code §§ 10.1-1307 and 10.1-1309 authorizes the Air Pollution Control Board to issue orders to any person to comply with the Air Pollution Control Law and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Air Pollution Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 10.1-1320 and 10.1-1309.1 provide for other additional penalties.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

FUTURE ACTIONS

DEQ staff wishes to discuss all aspects of their observations with you, including any actions needed ensure compliance with state law and regulations, any relevant or related measures you plan to take or have taken, and a schedule, as needed, for further activities. In addition, please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In order to avoid adversarial enforcement proceedings, Sample Enterprises, Inc. may be asked to enter into a Consent Order with the Department to formalize a plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the assessment of civil charges.

In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution, please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below.

Please contact Environmental Staffer at (000) 000-0000 or eestaffer@deq.virginia.gov **within 10 days of the date of this letter** to discuss this matter and arrange a meeting.

Sincerely,

Sam Hardtack
Air Enforcement Manager

cc: CASE FILE
SPECIALIST
MEDIA MANAGER

ATTACHMENT 3 - SAMPLE NOV (WASTE INSPECTION)

Month 00, 2005

CERTIFIED MAIL **(Recommended)**
Return Receipt Requested

Mr. John Sample
Sample Landfills of Virginia, Inc.
1 Sample Lane
Sample, Virginia 00000

NOTICE OF VIOLATION

RE: NOV No. 00-00-RO-000
Sample Landfills of Virginia, Inc., Complianceville Landfill Facility, Permit No. 579

Dear Mr. Sample:

This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the Waste Management Law and Regulations.

This letter addresses conditions at the facility named above, and also cites compliance requirements of the Waste Management Law and Regulations. Pursuant to Va. Code § 10.1-1455 (G), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq*. The Department requests that you respond **within 10 days of the date of this letter**.

OBSERVATIONS AND LEGAL REQUIREMENTS

On December 18, 2003, DEQ Verybest Regional Office staff conducted a compliance inspection of the Complianceville Landfill. A copy of the inspection report is attached. Staff also reviewed documents provided to DEQ during the course of the inspection. The following describe the staff's factual observations and identify the applicable legal requirements:

1. *Observations:* The area of the working face was estimated to be 135 ft x 102 ft. (**13,770** square feet total area).[13]

[13] This same condition was previously cited in Notice of Violation ("NOV") No. NOV # WS–02–08–VRO-030 issued to Sample Landfills of Virginia, Inc. on August 30, 2002, NOV # WS-03-03-VRO-033 issued to Sample

Legal Requirements: **Attachment II-1, Title 4.2.G of the Permit states that the working face will be approximately 2,500 square feet (or 50 ft x 50 ft). Pursuant to 9 VAC 20-80-240 (B) of the Virginia Solid Waste Management Regulations ("VSWMR"), this solid waste disposal facility shall be maintained and operated in accordance with the permit issued, and in accordance with the approved design and intended use of the facility. Pursuant to 9 VAC 20-80-480 (A) of the VSWMR, no person shall construct, operate or modify a solid waste management facility in this Commonwealth without a permit issued by the Director.**

2. *Observations:* Complianceville landfill is receiving waste tonnages in excess of 250 tons per day. Since the last inspection (August 5, 2003), the landfill has received tonnages in excess of 250 tons per day, the average tonnage received in December (1st through 17th) was approximately **1,122** tons per day.[14]

   Legal Requirements: **As stated in Title 4.2.G of Permit Attachment II-1, Operations Manual, the daily working face is based upon the projected waste stream of 250 tons per day. Also, as stated in Title 8.1 of Permit Attachment III-2, Design Report, the filling operations, lift heights, and cover soil requirements are based upon 250 tons per day. Pursuant to 9 VAC 20-80-240 (B) of the VSWMR, this solid waste disposal facility shall be maintained and operated in accordance with Attachment II-1, Title 4.2.G of the permit issued, and in accordance with the approved design and intended use of the facility. Pursuant to 9 VAC 20-80-480 (A) of the VSWMR, no person shall construct, operate or modify a solid waste management facility in this Commonwealth without a permit issued by the Director.**

3. *Observations:* There was ponded water on top of the landfill.[15]

   Legal Requirements: **Title 4.4.E of Permit Attachment II-1, Operations Manual and 9 VAC 20-80-250 (B) (6) (c) require, in part, that intermediate cover and drainage structures be in place to prevent ponding and to minimize infiltration of water into solid waste cells. 9 VAC 20-80-250 (C) (11) requires owners or operators to maintain these run-off control systems.**

Landfills of Virginia, Inc. on March 21, 2003, NOV #WS-03-05-VRO-034 issued to Sample Landfills of Virginia, Inc. on May 28, 2003, and NOV #WS--03--08--VRO--035 issued to Sample Landfills of Virginia, Inc. on September 2, 2003.

[14] This same condition was previously cited in NOV # WS–02–08–VRO-030 issued to Sample Landfills of Virginia, Inc. on August 30, 2002, in NOV #WS-03-03-VRO-033 issued to Sample Landfills of Virginia, Inc. on March 21, 2003, in NOV #WS-03-05-VRO-034 issued to Sample Landfills of Virginia, Inc. on May 28, 2003, and NOV #WS--03--08--VRO--035 issued to Sample Landfills of Virginia, Inc. on September 2, 2003.

[15] Ponded water on top of the landfill was also observed during the July 7, 2003 site visit and August 5, 2003 inspection, and was previously cited in NOV #WS--03--08--VRO--035 issued to Sample Landfills of Virginia, Inc. on September 2, 2003

4. *Observations:* There were uneven and eroded areas on the external slopes of cells 1 and 2. Compacted soil was not present on the interior slopes of cells 6, 7, and 3. On the exterior slopes of cell 1, there was a large area that appeared unstable and had shifted down-slope.

   Legal Requirements: **Title 4.4.E of Permit Attachment II-1, Operations Manual, and 9 VAC 20-80-250 (C) (2) (d) of the VSWMR require intermediate cover of at least 6 inches of additional compacted soil be applied whenever an additional lift of refuse is not to be applied within 30 days. Further, these sections require that all areas with intermediate cover shall be inspected as needed, but not less than weekly. Additional cover material shall be placed on all cracked, eroded, and uneven areas as required to maintain the integrity of the intermediate cover system.**

5. *Observations:* Leachate appeared to have overflowed the collection sump onto the ground around the sump area.

   Legal Requirements: **Attachment II-1, Title 5.1.D of the permit requires that all components of the leachate collection system be inspected and maintained to achieve its intended function.**

6. *Observations:* There were waste containers stored in the truck and container area that contained waste material. One container held sludge, another held concrete, and one contained construction/demolition/debris ("C/D/D"). The container with sludge had discharged a dark liquid onto the ground.

   Legal Requirements: **Attachment II-1, Title 4.2.G of the permit does not permit the storage or discharge of waste in the truck and container area.**

ENFORCEMENT AUTHORITY

Va. Code § 10.1-1455 of the Waste Management Act provides for an injunction for any violation of the Waste Management Act, Waste Management Board regulations, an order, or permit condition, and provides for a civil penalty up to $32,500 per day of each violation of the Waste Management Act, regulation, order, or permit condition. In addition, Va. Code § 10.1-1455 (G) authorizes the Waste Management Board to issue orders to any person to comply with the Waste Management Act and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Waste Management Act and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 10.1-1455 (D) and 10.1-1455 (I) provide for other additional penalties.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

FUTURE ACTIONS

DEQ staff wishes to discuss all aspects of their observations with you, including any actions needed ensure compliance with state law and regulations, any relevant or related measures you plan to take or have taken, and a schedule, as needed, for further activities. In addition, please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In order to avoid adversarial enforcement proceedings, Sample Landfills of Virginia, Inc. may be asked to enter into a Consent Order with the Department to formalize a plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the assessment of civil charges.

In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution, please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below.

Please contact Environmental Staffer at (000) 000-0000 or eestaffer@deq.virginia.gov **within 10 days of the date of this letter** to discuss this matter and arrange a meeting.

Sincerely,

Sam Hardtack
Waste Enforcement Manager

cc: CASE FILE
SPECIALIST
MEDIA MANAGER

ATTACHMENT 4 - SAMPLE NOV (WATER DMR DATA)

Month 00, 2005

CERTIFIED MAIL **(Recommended)**
Return Receipt Requested

Mr. John Sample
Sample Wastewater Ltd.
1 Sample Lane
Sample, Virginia 00000

NOTICE OF VIOLATION

RE: NOV No. 00-00-RO-000
Sample Wastewater Ltd., Complianceville Facility, VPDES Permit No. 0000

Dear Mr. Sample:

This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the State Water Control Law and Regulations.

This letter addresses conditions at the facility named above, and also cites compliance requirements of the State Water Control Law and Regulations. Pursuant to Va. Code § 62.1-44.15 (8a), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq*. The Department requests that you respond **within 10 days of the date of this letter.**

OBSERVATIONS AND LEGAL REQUIREMENTS

Sample Wastewater Ltd., submitted discharge monitoring reports (DMRs) to DEQ's Verybest Regional Office, including the following *relevant* data results. The following describe the staff's factual observations and identify the applicable legal requirements.

Parameter	Observations - DMR Monitoring Period and Relevant Reported Monitoring Results									Legal Req.*
	09/04	10/04	11/04	12/04	01/05	02/05	03/05	04/05	05/05	
Total Recoverable Copper average and maximum concentration (µg/L)	10	26	18	28	41	53	94	61	12	**5.8**
Total Recoverable Zinc average and Maximum Concentration (µg/L)	354	206	195	510	436	389	298	179	205	**40**
TKN average concentration (mg/L)	7.3	4.2	4.5	4.5	17.6	25.3	23.2	12.5	7.3	**3**
TKN maximum concentration (mg/L)		19.8		6.4	5.8	22.8	28	33	17.7	**4.5**
TSS average concentration (mg/L)				20.4	22.4	14				**10**
TSS maximum concentration (mg/L)			19.6	35.5	32.4	20				**15**
DO minimum concentration (mg/L)				7	8					**9**
$CBOD_5$ average concentration (mg/L)				16	15.5	13.8				**10**
$CBOD_5$ maximum concentration (mg/L)				41.6	23.4	18.5				**15**
pH						no data				

*** The VPDES permit for this facility, issued May 31, 2002 and amended September 4, 2004, contains conditions that enumerate the effluent limitations in this column. Va. Code § 62.1-44.5 prohibits waste discharges or other quality alterations of state waters except as authorized by permit. 9 VAC 25-31-50 provides that "except in compliance with a VPDES permit, or another permit, issued by the board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."**

ENFORCEMENT AUTHORITY

Va. Code § 62.1-44.23 of the State Water Control Law provides for an injunction for any violation of the State Water Control Law, any State Water Control Board rule or regulation, an order, permit condition, standard, or any certificate requirement or provision. Va. Code §§ 62.1-44.15 and 62.1-44.32 provide for a civil penalty up to $32,500 per day of each violation of the same. In addition, Va. Code § 62.1-44.15 authorizes the State Water Control Board to issue orders to any person to comply with the State Water Control Law and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the State

Water Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 62.1-44.32 (b) and 62.1-44.32 (c) provide for other additional penalties.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

FUTURE ACTIONS

DEQ staff wishes to discuss all aspects of their observations with you, including any actions needed ensure compliance with state law and regulations, any relevant or related measures you plan to take or have taken, and a schedule, as needed, for further activities. In addition, please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In order to avoid adversarial enforcement proceedings, Sample Enterprises, Inc. may be asked to enter into a Consent Order with the Department to formalize a plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the assessment of civil charges.

In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution, please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below.

Please contact Environmental Staffer at (000) 000-0000 or eestaffer@deq.virginia.gov **within 10 days of the date of this letter** to discuss this matter and arrange a meeting.

Sincerely,

Sam Hardtack
Water Enforcement Manager

cc: CASE FILE
SPECIALIST
MEDIA MANAGER

ATTACHMENT 5 – TABLES OF STANDARD PARAGRAPHS

Notice of Alleged Violation Authority Paragraphs – for both Warning Letters and NOVs **(language in brackets is for NOVs only)**	
Air	**(Warning Letter first paragraphs)** The Department of Environmental Quality ("DEQ" or "the Department") has reason to believe that the Complianceville facility may be in violation of the Air Pollution Control Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the Air Pollution Control Law and Regulations. Pursuant to Va. Code § 10.1-1309 (A) (vi), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 20 days of the date of this letter.** **(NOV first paragraphs)** This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the Air Pollution Control Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the Air Pollution Control Law and Regulations. Pursuant to Va. Code § 10.1-1309 (A) (vi), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 10 days of the date of this letter.** **(Enforcement Authority)** Va. Code § 10.1-1316 of the Air Pollution Control Law provides for an injunction for any violation of the Air Pollution Control Law, the Air Board regulations, an order, or permit condition, and provides for a civil penalty up to $32,500 per day of each violation of the Air Pollution Control Law, regulation, order, or permit condition. In addition, Va. Code §§ 10.1-1307 and 10.1-1309 authorizes the Air Pollution Control Board to issue orders to any person to comply with the Air Pollution Control Law and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Air Pollution Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 10.1-1320 and 10.1-1309.1 provide for other additional penalties.

	The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.
Water and UST (Art. 9)	**(Warning Letter first paragraphs)** The Department of Environmental Quality ("DEQ" or "the Department") has reason to believe that the Complianceville facility may be in violation of the State Water Control Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the State Water Control Law and Regulations. Pursuant to Va. Code § 62.1-44.15 (8a), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 20 days of the date of this letter.** **(NOV first paragraphs)** This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the State Water Control Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the State Water Control Law and Regulations. Pursuant to Va. Code § 62.1-44.15 (8a), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 10 days of the date of this letter.** **(Enforcement Authority)** Va. Code § 62.1-44.23 of the State Water Control Law provides for an injunction for any violation of the State Water Control Law, any State Water Control Board rule or regulation, an order, permit condition, standard, or any certificate requirement or provision. Va. Code §§ 62.1-44.15 and 62.1-44.32 provide for a civil penalty up to $32,500 per day of each violation of the same. In addition, Va. Code § 62.1-44.15 authorizes the State Water Control Board to issue orders to any person to comply with the State Water Control Law and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the State Water Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 62.1-44.32 (b) and 62.1-44.32 (c) provide for other additional penalties.

	The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.
Waste	**(Warning Letter first paragraphs)** The Department of Environmental Quality ("DEQ" or "the Department") has reason to believe that the Complianceville facility may be in violation of the Waste Management Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the Waste Management Law and Regulations. Pursuant to Va. Code § 10.1-1455 (G), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 20 days of the date of this letter.** **(NOV first paragraphs)** This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the Waste Management Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the Waste Management Law and Regulations. Pursuant to Va. Code § 10.1-1455 (G), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 10 days of the date of this letter.** **(Enforcement Authority)** Va. Code § 10.1-1455 of the Waste Management Act provides for an injunction for any violation of the Waste Management Act, Waste Management Board regulations, an order, or permit condition, and provides for a civil penalty up to $32,500 per day of each violation of the Waste Management Act, regulation, order, or permit condition. In addition, Va. Code § 10.1-1455 (G) authorizes the Waste Management Board to issue orders to any person to comply with the Waste Management Act and regulations, including the imposition of a civil penalty for violations of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Waste Management Act and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 10.1-1455 (D) and 10.1- 1455 (I) provide for other additional penalties. The Court has the inherent authority to enforce its injunction, and is

	authorized to award the Commonwealth its attorneys' fees and costs.
Oil Discharges and AST (Art. 11)	**(Warning Letter first paragraphs)** The Department of Environmental Quality ("DEQ" or "the Department") has reason to believe that the Complianceville facility may be in violation of the State Water Control Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the State Water Control Law and Regulations. Pursuant to Va. Code § 62.1-44.15 (8a), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 20 days of the date of this letter.** **(NOV first paragraphs)** This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the State Water Control Law and Regulations. This letter addresses conditions at the facility named above, and also cites compliance requirements of the State Water Control Law and Regulations. Pursuant to Va. Code § 62.1-44.15 (8a), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 10 days of the date of this letter.** **(Enforcement Authority)** Va. Code § 62.1-44.34:20 of the State Water Control Law provides for an injunction for any violation of Article 11 of the State Water Control Law, and any State Water Control Board regulation, administrative or judicial order, or any term or condition of approval issued pursuant to Article 11; and provides for a civil penalty of up to $100,000 per violation depending on the type of violation, with additional civil penalties to be assessed for each additional day of violation. Va. Code §§ 62.1-44.15 and 62.1-44.34:20 also authorizes the State Water Control Board to issue orders to any person to comply with Article 11 of the State Water Control Law and regulations, including the imposition of a civil penalty for violations, of up to $100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with Article 11 of the State Water Control Law and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 62.1-44.34:20 (E), (F), and (G) provide for other additional penalties. The Court has the inherent authority to enforce its injunction, and is

	authorized to award the Commonwealth its attorneys' fees and costs.
Ground Water Manage-ment Act	**(Warning Letter first paragraphs)** The Department of Environmental Quality ("DEQ" or "the Department") has reason to believe that the Complianceville facility may be in violation of the Ground Water Management Act and Regulation. This letter addresses conditions at the facility named above, and also cites compliance requirements of the Ground Water Management Act and Regulation. This letter is not intended as a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 20 days of the date of this letter.** **(NOV first paragraphs)** This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Complianceville facility may be in violation of the Ground Water Management Act and Regulation. This letter addresses conditions at the facility named above, and also cites compliance requirements of the Ground Water Management Act and Regulation. This letter is not intended as a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 et seq. The Department requests that you respond **within 10 days of the date of this letter.** **(Enforcement Authority)** Va. Code § 62.1-269 of the Ground Water Management Act provides for an injunction for any violation of the Ground Water Management Act, any regulation issued pursuant to the Ground Water Management Act, or of any order, permit condition, standard or any certificate requirement or provision. Va. Code § 62.1-270 of the Ground Water Management Act provides for a civil penalty up to $25,000 per day of each violation. Va. Code § 62.1-268 authorizes the Board to issue special orders to persons for such violations. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Ground Water Management Act and regulations, and to impose a civil penalty of not more than $10,000. Va. Code §§ 62.1-270 (B) and 62.1-270 (C) provide for other additional penalties. The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

Notice of Alleged Violation "Future Actions" Paragraphs	
For a Warning Letter	After reviewing this letter, please respond in writing to DEQ **within 20 days of the date of this letter** detailing actions you have taken or will be taking to ensure compliance with state law and regulations. If corrective action will take longer than 90 days to complete, you may be asked to sign a Letter of Agreement or enter into a Consent Order with the Department to formalize the plan and schedule. *It is DEQ policy that appropriate, timely, corrective action undertaken in response to a Warning Letter will avoid adversarial enforcement proceedings and the assessment of civil charges or penalties.* Please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution, please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below. Your contact at DEQ in this matter is Environmental Staffer. Please direct written materials to her attention. If you have questions or wish to arrange a meeting, you may reach her directly at (000) 000-0000 or eestaffer@deq.virginia.gov.
For a NOV	DEQ staff wishes to discuss all aspects of their observations with you, including any actions needed ensure compliance with state law and regulations, any relevant or related measures you plan to take or have taken, and a schedule, as needed, for further activities. In addition, please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In order to avoid adversarial enforcement proceedings, Sample Enterprises, Inc. may be asked to enter into a Consent Order with the Department to formalize a plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the assessment of civil charges. In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution,

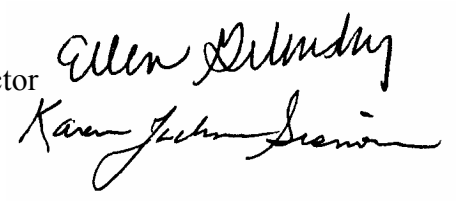
	please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below. Please contact Environmental Staffer at (000) 000-0000 or eestaffer@deq.virginia.gov **within 10 days of the date of this letter** to discuss this matter and arrange a meeting.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: Waste Guidance Memo No. 06-2005 and Water Guidance Memo No. 05-2012
COORDINATION OF PERMITTING REQUIREMENTS FOR WETLANDS AND THE SITING OF SOLID WASTE LANDFILLS

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Water Quality Division Director
Karen Jackson Sismour, Waste Division Director



Date: August 22, 2005

Copies: Rick Weeks, Regional Water Permit Managers, Regional Water Compliance Managers, Regional Waste Program Managers, Waste Permitting Office Director

Summary:

The Department of Environmental Quality (DEQ) administers both Waste and Water programs throughout Virginia. Both programs have overlapping jurisdiction regarding the approval of wetland impacts and stream impacts at landfills. This guidance is intended to coordinate the review activities of the two permit programs to ensure that both regulations are satisfied, and to ensure that the permit conditions of the two permits are consistent. Coordination on these permits is also needed because landfill siting review and approval is a Central Office function and VWP permit applications are reviewed in the Regional Offices.

Legislation was approved on July 1, 2005 that affected landfill siting and wetland impacts. New landfills or expansion of existing landfills may involve wetland/stream impacts and all such projects will need to be evaluated to determine whether they satisfy the solid waste siting criteria and the VWP requirement to demonstrate avoidance and minimization with respect to impacts to wetlands and streams. Since both divisions' regulations may alter the location of the landfill and associated features, early coordination is critical. The "companion" technical guidance for the legislation is Waste Guidance Memorandum 04-2005.

Electronic Copy:

An electronic copy of this guidance is available for staff internally on DEQNet, and for the general public on DEQ's website at http://www.deq.virginia.gov/waterguidance/permits.html.

Contact Information:

Please contact Catherine Harold, Office of Wetlands and Water Protection Program, at (804) 698-4047 or cmharold@deq.virginia.gov, or Paul Farrell, Waste Division, at (804) 698-4214 or epfarrell@deq.virginia.gov with any questions regarding the application of this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

COORDINATION OF PERMITTING REQUIREMENTS FOR WETLANDS AND THE SITING OF SOLID WASTE LANDFILLS

1. Background

Solid Waste Disposal Facilities must have siting (Part A) approval in order to submit a Design Report (Part B) application and obtain a Solid Waste Permit. In the Part A application, the applicant must demonstrate how wetlands will be avoided and protected in the siting of the landfill or its supporting facilities. If wetlands can not be avoided, then the applicant must minimize the impact and mitigate the taking of the wetlands. The VWP permit satisfies this requirement.

Solid Waste Disposal Facilities seeking to impact wetlands and/or streams are required to submit an application to DEQ under the State Water Control Law (§§ 62.1-44.15 and 62.1-44.15:5, Code of Virginia) and the VWP regulations. In the VWP application, the applicant is required to demonstrate that impacts to wetlands and/or streams have been "avoided and minimized to the maximum extent practicable," regardless of the amount of the impact. Mitigation is required for unavoidable impacts greater than 1/10 of an acre. Solid Waste Part A applications should include the required wetland permits prior to permit issuance. This guidance refers to wetlands and streams as the same potential impacts for identification purposes on water permit applications and applications for landfill siting. A site visit confirms the type of impacts irrespective of the applicant's intended impacts.

2. Authority

§ 62.1-44.15:5 of the Code of Virginia authorizes DEQ to issue Virginia Water Protection Permits (VWP). § 9 VAC 25-210-10 et seq. are the main regulations, which implement the Virginia Water Protection Permit Program. § 9VAC-25-210-660 et seq., § 9VAC 25-210-670 et seq., § 9VAC 25-210-680 et seq., and § 9 VAC 25-210 – 690 et seq. are the regulations that govern four general permits under the VWP program. § 10.1-1408.1 of the Code of Virginia authorizes DEQ to issue Solid Waste Permits for Landfills. The following sections from the Code of Virginia pertain to the siting of municipal solid waste landfills:

§ 10.1-1408.5. Special provisions regarding wetlands.

A. The Director shall not issue any solid waste permit for a new municipal solid waste landfill or the expansion of a municipal solid waste landfill that would be sited in a wetland, provided that this subsection shall not apply to subsection B or the (i) expansion of an existing municipal solid waste landfill located in a city with a population between 41,000 and 52,500 when the owner or operator of the landfill is an authority created pursuant to § 15.2-5102 ~~which~~ that has applied for a permit under § 404 of the federal Clean Water Act prior to January 1, 1989, and the owner or operator has received a permit under § 404 of the federal Clean Water Act and § 62.1-44.15:5 of this Code, or (ii) construction of a new municipal solid waste landfill in any county with a population between 29,200 and 30,000, according to the 1990 United States Census, and provided that the municipal solid waste landfills covered under clauses (i) and (ii) have complied with all other applicable federal and state environmental laws and regulations. It is expressly understood that while the provisions of this section provide an exemption to the general siting prohibition contained herein; it is not the intent in so doing to express an opinion on whether or not the project should receive the necessary environmental and regulatory permits to proceed. For the purposes of this section, the term "expansion of a municipal solid waste landfill" shall include the siting and construction of new cells or the expansion of existing cells at the same location.

B. The Director may issue a solid waste permit for the expansion of a municipal solid waste landfill located in a wetland only if the following conditions are met: (i) the proposed landfill site is at least 100 feet from any surface water body and at least one mile from any tidal wetland; (ii) the Director determines, based upon the existing condition of the wetland system, including, but not limited to, sedimentation, toxicity, acidification, nitrification, vegetation, and proximity to existing permitted waste disposal areas, roads or other structures, that the construction or restoration of a wetland system in another location in accordance with a Virginia Water Protection Permit approved by the State Water Control Board would provide higher quality wetlands; and (iii) the permit requires a minimum two-to-one wetlands mitigation ratio. This subsection shall not apply to the exemptions provided in clauses (i) and (ii) of subsection A.

D. This section shall not apply to landfills which impact less than ~~1.25~~ *two* acres of nontidal wetlands.

E. For purposes of this section, "wetland" means any tidal wetland or nontidal wetland contiguous to any tidal wetland or surface water body.

§ 9VAC25-210-50 of the VWP regulations (Prohibitions and requirements for VWP permits) requires compliance with the Municipal Solid Waste siting law:

B. No VWP permit shall be issued for the following:

1. Where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations including but not limited to §10.1-1408.5 of the Code of Virginia;

3. Definitions

The definitions in 9 VAC 25-210-10 of the VWP regulations and 9 VAC 20-80-10 of the

solid waste regulations apply to these Procedures.

Under the VWP regulations, wetlands "means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The VWP program also regulates isolated wetlands.

4. Requirements

A. Water Permit Program

1. Coordination with Central Office Waste Permit Staff begins when a Regional VWP Permit Writer receives a VWP permit application or a request for a VWP pre-application meeting and the development activity at the site is a new or existing landfill.
   If the purpose of the development activity at the site is unknown or could be related to a landfill activity, i.e., borrow area, access roads, other activities within 1,000 feet of a landfill; the applicant must provide the affirmative information. The VWP permit writer will add a comment to the completeness letter that requests the applicant to clarify the site use. The VWP permit writer will also notify, in writing, the Waste Permitting Office Director of the scope of the project and request coordination as needed in accordance with 9 VAC 20-80, 9 VAC 25-210, and existing technical guidance.

   Waste Permit Staff will assist in determining if such VWP activities are associated with a landfill and if the activity satisfies the Part A siting criteria. This determination will be confirmed after the completeness review of the water permit application and may be confirmed during the completeness review if time allows. The primary responsibility for the initial determination of VWP applicability with a landfill is with the applicant.

2. Once the applicant certifies that the activity is not associated with a landfill or the Waste Permit Staff determine that the activity does not require siting review, the VWP application may be processed in accordance with standard water permit application processing procedures.

3. If the application specifies that impacts are associated with a landfill, the VWP permit writer must notify the applicant in writing as soon as possible during the completeness review, that the proposed activity may involve landfill siting approval limitations on wetlands and that no further action can be taken by the VWP Program (per 9VAC25-210-50.B.1) until the Waste Permit Program determines what those wetland limitations are in accordance with 9 VAC 20-80. The VWP permit writer should copy the review letter and application to the Waste Permitting Office Director and the Regional Waste Program Manager. Once both applications are submitted, coordination should be conducted to ensure that both regulations are satisfied, and to ensure that the permit conditions of the two permits are consistent.

B. Waste Permit Program

1. In the Waste Permit Program, wetland and/or stream impacts from landfill development are intended to be fully addressed in the Site Suitability (Part A application) determination for landfills. Coordination with Regional VWP Permit Staff begins when the Central Office Part A permit writer receives a Part A application or a request for pre-application review, where wetlands and/or streams may be impacted. The Part A permit writer will notify, in writing, the Regional Waste Program Manager and the Deputy Regional Director. All Part A applications that include wetland and/or stream impacts or copies of wetland permit applications or wetland documents will be forwarded to the Deputy Regional Director. The Deputy Regional Director will then notify the regional VWP staff. The Part A permit writer will invite a VWP permit writer to the initial pre-application meeting for all landfill siting meetings.

2. The Part A permit writer will review all documents that affect landfill siting and wetland and/or stream impacts. The Part A permit writer will determine if the activity satisfies the Part A siting criteria. The Part A permit writer will advise, in writing, all necessary DEQ staff (waste and water) of the scope of the project and request coordination as needed in accordance with 9 VAC 20-80, 9 VAC 25-210, and existing technical guidance. The Part A permit writer should request that the applicant submit a Joint Permit Application for impacts to wetlands and/or streams. Once both applications (Part A and VWP) are submitted, coordination should be conducted to ensure that both regulations are satisfied, and to ensure that the permit conditions of the two permits are consistent.

3. If the Regional Solid Waste Permit Writer has any question regarding any issue of landfills and wetlands, he/she should contact their immediate supervisor first and may contact the CO Solid Waste Permit Coordinator regarding coordination or technical issues.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality Programs
Ellen Gilinsky, Director

Subject: Guidance Memorandum Number 05-2003
Revisions to the Virginia Water Protection General Permits 9VAC25-660, 9VAC25-670, 9VAC25-680, 9VAC25-690 (Effective 1/26/05)

To: Regional Directors

CC: Deputy Regional Directors, Regional Water Protection Permit Managers and Program Staff

From: Ellen Gilinsky, Ph.D., Director

Date: February 28, 2005

Summary:

The Virginia Water Protection General Permits were first promulgated in October 2001. Revisions occurred in 2004 which became effective on January 26, 2005. The purpose of this guidance is to summarize key changes to the general permits (GPs) and discuss transition issues between old and new regulations.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov/water/.

Contact information:

Please contact Catherine Harold, Virginia Water Protection Permit Program Manager, at 804-698-4047 or mcmharold@deq.virginia.gov if you have any questions about the revised VWP General Permits.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Revisions to the Virginia Water Protection General Permits
9VAC25-660, 9VAC25-670, 9VAC25-680, 9VAC25-690
(Effective 1/26/05)

Background:

Four Virginia Water Protection General Permits (GPs) were first promulgated in October 2001. Revisions to all four of the GPs were made in 2004 through the APA process; these revisions became effective on January 26, 2005, at which time the original GP regulations were replaced by the revised GP regulations.

The purpose of the revisions was to correct several administrative procedures, clarify application and permitting requirements, and allow for a more efficient application review process. Based on our experience in implementing these regulations, these corrections were needed to improve applications for coverage, timeframes for issuance of authorizations, and coordination with the U.S. Army Corps of Engineers State Program General Permit (SPGP-01). No change to the upper thresholds of coverage under these regulations or to the 2:1 compensation ratio for wetland impacts were considered or implemented during this revision process, but may be considered at a later date when the GPs are reissued. The original expiration dates of the four GPs were not changed by these revisions.

Key Changes:

In general, changes made to the original regulations focused on: (1) the inclusion of certain mining activities to be authorized under the general permit regulation WP4, as reflected in Sections 10, 30, 60, and 100 of 9 VAC 25-690; (2) to clarify application informational requirements; types of compensation allowed; mitigation plan, monitoring, and reporting requirements; and termination process for events beyond permittee's control; (3) to include language concerning refunds of compensation payments and minor clarifications of a grammatical nature; and (4) to revise the Forms section to include version dates and additional document titles.

The following is a list of the major changes to the regulations that may affect how authorizations are processed, reviewed, issued, denied or revised. This list does not substitute for careful review of the GP regulations themselves to ensure that you are familiar with these changes as you move forward in reviewing and processing GP applications.

1. clarify what is needed to decide that an application is complete, including informational and time requirements (Section 60);
2. allow for payments to mitigation bank or in-lieu fee funds to be linked to the start of work in jurisdictional areas rather than to the date of authorization issuance (Section 70 and Section 100 Part IIA of permit authorization);
3. modify the procedure for pre-construction notification to include limit of 300 linear feet on streams (Section 50A);
4. allow the permittee to decrease impacts and associated compensation through a Notice of Planned Change instead of having to terminate and reissue the authorization (Section 80B);

5. clarify the section on protection of non-impacted wetlands on the project and mitigation sites that are within 50 feet of permitted activities (Section 100 Part IC of permit authorization);
6. allow for termination of authorizations without penalty when the project does not go forward (Termination by Consent, Section 90);
7. clarify exceptions to coverage section for consistency between the general permits (Section 40);
8. specify a timeframe of 60 days prior to expiration of authorization for requests for extension or renewal of general permit authorizations (Section 100, Part IB);
9. clarify requirements for avoidance, minimization and compensation alternatives, such as what types of compensation are acceptable for wetlands, streams, and open water (Section 70);
10. clarify limits to use of multiple general permit authorizations for the same project (Section 40);
11. clarify the distinctions between temporary and permanent impacts and conversion impacts by adding a definition of conversion (Section 10); adding the ratio for conversion impacts (Section 70); revising the definition of temporary impacts (Section 10); removing the requirement for a Notice of Planned change for increase in temporary impacts alone making a written notification and restoration suffice (Section 80); adding definition for permanent impacts (Section 10); and adding temporary or permanent as modifiers throughout the regulation text;
12. clarify lower threshold for reporting only authorizations to include up to one-tenth acre of surface waters, but not more than 300 linear feet of stream channel, to maintain consistency with the U.S. Army Corps of Engineers SPGP-01 requirements (Section 50);
13. simplifies the required information that needs to be submitted for a conceptual or final compensation plan when compensation is via purchase of bank credits or contribution to an in-lieu fee fund (Section 60 B);
14. modify certain construction monitoring requirements, such as photographic documentation requirement, water quality parameter testing methods, and reporting deadlines (Section 100, Part IID and E);
15. make minor grammatical changes throughout for clarity;
16. revise the definition of perennial stream (Section 10).

Transition Issues with regard to Application processing:

As per 9 VAC 25-210-130 G, the following provisions have been developed to guide DEQ permit staff on processing VWP general permits under the revised regulations.

1. All new permit applications received on or after January 26, 2005, as well as permit applications that are currently in the review process, will be issued under the revised general permit regulation rules that became effective on January 26, 2005. The previous version of the general permit *regulations* are null and void, having been replaced by the revised versions. However, any general permit *authorizations* issued prior to January 26, 2005 will remain in full force and effect for their term and do not have to be reissued.

If a permit needs to be re-authorized, then the re-authorization should be processed in accordance with the January 26, 2005 regulations, and the project shall comply with the new regulations. The previous regulations will not be applicable to the project.

2. For any Notice of Planned Change that is received on or after January 26, 2005, process the Notice as per the revised regulation rules, even if their permit was issued under the old regulations. For example, if a permittee with a WP4 authorization dated 2004 submits a Notice of Planned Change for an additional 0.2 acres of wetland impacts, review the request based on the revised regulation for WP4. Another example may be a change in mitigation. Again, review the request as per the criteria in the revised regulations.

3. When processing a Notice of Planned change, use the template letters provided in the 2005 VWP Permit Manual and revise the original permit authorization cover page to include the changes. Do not change the effective or expiration dates on the cover page. Send *only* the letter and signed, revised permit authorization cover page to the permittee, as the conditions in their original permit authorization remain in effect until the authorization expires, and also applies to the planned change.

4. For Continuation of Coverage requests received on or after January 26, 2005 *and that involve continuation for monitoring purposes only* (i.e., *all impacts are taken* and permittee is just finishing up last monitoring report, or is just maintaining erosion and sediment control measures), review and process the request under the revised regulations. A new *application and application fee are not required per 9 VAC 25-210-130G*. Do not issue a new authorization; use the template letters provided in the 2005 VWP Permit Manual.

5. For Continuation of Coverage requests received on or after January 26, 2005 *and that apply to any other aspect of the project except monitoring, including the expiration of the original authorization term,* review and process the request under the revised regulations and issue a *new authorization*. A new application is not required; however, a permit application *fee is required*, regardless of the amount of additional time needed.

6. Permit applications received prior to January 26, 2005 that propose to impact up to one-tenth acre surface waters, must now be processed under the revised regulation rules. These projects were formerly processed as 'up to one-tenth' authorizations, but because the regulation now qualifies the reporting-only impacts to be 'up to one-tenth acre wetlands (or open water) or 300 linear feet of stream channel', the projects having >300 linear feet of stream impacts no longer qualify for an 'up to one-tenth' authorization. In this case, compensation for the stream impacts will be required by DEQ. *Under this special circumstance only*, those applications submitted before January 26, 2005, and that are still under review after that date, will be processed without the additional requirements of submitting a new permit application and permit application fee. Note that the applicant should already be compensating for stream impacts per their Corps' permit or SPGP determination, and therefore, the requirement for stream compensation by DEQ should not be burdensome.

7. Regarding Section 60 E (Incomplete Application) of each general permit regulation, the last sentence notes the requirement for a new application when the application is not complete. This requirement will reset the application review processing clock, but does not trigger a new permit application number, new permit application fee, or entry of a new CEDS permit record.

Transition Issue with regard to Authorization and Notification in 9 VAC 25-670, -680, and -690 (WP2, WP3, WP4):

The language in Section 50 of WP2, WP3, and WP4 may be confusing as it relates to notification requirements, and thus, compensation requirements for surface water impacts. Until such time that these sections can be revised to clarify this situation, the following table will apply and presents the scenarios that either require an abbreviated JPA and no compensation or a full JPA and compensation.

No Compensation Required	Compensation Required
≤ 1/10 acre wetland/open water	> 1/10 acre wetlands/open water
or	or
≤ 300 linear feet stream channel	> 300 LF stream channel
or	or
≤ 1/10 acre surface waters, and when less than or equal to 300 LF stream channel	> 1/10 acre surface waters
	or
	≤ 1/10 acre surface waters, but more than 300 LF of stream channel

Transition Issue with regard to Authorization and Notification in 9 VAC 25-660 (WP1):

It has come to our attention that the notification requirements in the WP1 (9 VAC 25-660-50) may be confusing because they reference that notification to the board is required for wetland or open water impacts greater than 1/10 acre or permanent stream channel impacts greater than 300 linear feet (LF), *which includes both intermittent and perennial channels*. However, the WP1 only authorizes impacts up to 125 LF of *perennial* stream channel. Thus, notification is really required for stream impacts up to 125 LF under WP1, since the 300 LF notification limit may include perennial impacts that exceed the 125 LF permit use limit.

Until such time that these sections can be revised to clarify this situation, the following procedures will apply:

If the proposed WP1 project impacts less than 300 linear feet (and not more than 125 linear feet of perennial stream channel), then the project qualifies under the WP1 with no compensation required.

If the project impacts are greater than 125 LF of perennial stream channel (but under 300 LF), then the project does not qualify for the WP1, since the use threshold for WP1 is exceeded. Any project falling into this category may qualify under the WP4 with no compensation required instead.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality Programs
Ellen Gilinsky, Ph.D., Director

Subject: Guidance Memorandum Number 04-2023
2004 Joint Permit Application Form for Virginia Water Protection Permits

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: December 10, 2004

Copies: Deputy Regional Directors, Regional Water Permit Managers and VWP Managers, VWP Staff, Cindy Berndt

Summary:

The Joint Permit Application (JPA) is used by DEQ, the Virginia Marine Resources Commission (VMRC), the US Army Corps of Engineers (Corps), and local wetlands boards as the mechanism for applying for work in all types of surface waters in the Commonwealth. The 2003 version of the JPA was replaced by the Standard JPA and the Tidewater JPA, effective October 2004, as developed by an interagency committee consisting of Corps, DEQ, and VMRC staff. The Standard JPA is the more commonly used application, whereas the Tidewater JPA is used for mostly shoreline projects in the Tidewater region of Virginia. Both forms are used to permit projects under Virginia Water Protection Permit Program.

Revisions to the JPA were made to remove obsolete information, add information needed for recently implemented permit program changes at the Federal and State levels, and remove duplicative informational requirements, as well as overall correction of typographical errors and poor organization/presentation. The revisions made were also based in part on JPAs in other Corps districts.

A further initiative was undertaken in 2004 to introduce the electronic submission of both JPAs. The Corps-sponsored initiative brought representatives from each agency together with a vendor who developed the electronic submission program. The electronic submission option is expected to be available to the public in early January 2005.

The most current October 2004 JPAs are available electronically on the Corp's web page at http://www.nao.usace.army.mil/Regulatory/JPA.html, or via a link on the DEQ web page at http://www.deq.state.va.us/wetlands/permitfees.html.

Electronic Copy:

An electronic copy of this guidance in PDF-format is available on DEQNet at http://deqnet/docs/default.asp?path=./main/water/Guidance_Memoranda, and for the general public on DEQ's website at http://www.deq.virginia.gov/water.

Contact information:

Please contact Catherine Harold, Virginia Water Protection Permit Program Manager, at 804-698-4047 or cmharold@deq.virginia.gov if you have any questions about the Joint Permit Applications.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Programs Coordination
Ellen Gilinsky, Ph.D., Director

Subject: Guidance Memo No. 04-2020
Significant Figures for Discharge Monitoring Reports

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: October 29, 2004

Copies: Regional Water Permit Managers, Regional Water Compliance Managers, Amy Owens, OWPP Staff

Summary:

This memo clarifies the number of significant figures to be used in permits and to report monitoring results on the Discharge Monitoring Reports (DMR). It applies only to permits drafted or modified on or after the date of this memorandum. This guidance replaces Guidance Memo No. 03-2008 (Significant Figures).

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov/water/.

Contact information:

Questions or comments regarding this topic can be directed to Betsy Ziomek at (804) 698-4181, e-mail address esziomek@deq.virginia.gov

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Significant Figures for Discharge Monitoring Reports

For permits drafted or modified on or after the date of this memorandum, effluent limitations should generally be written using at least two significant figures taking into account the analytical methods approved to determine and report compliance. Where existing permit limits exceed two significant figures, it is not necessary to reduce the number of significant figures if an approved test method can accommodate the greater sensitivity/precision. There are several exceptions - (a) bacteriological limits, (b) acute and chronic WET endpoints, and (c) BOD only if a single digit effluent is to be required. Bacteriological and WET data are based on "counts" and therefore not subject to significant figure rules and the method for determining BOD is not accurate enough to provide data beyond a whole number.

Monitoring results reported on the Discharge Monitoring Report (DMR) should be reported to the accuracy of the test, which must be capable of reporting at least the same number of significant digits as the permit limit for a given parameter. Rounding the results to the number of significant digits in the permit, where the test method is sensitive enough to report more, is not acceptable and shall not be allowed. If there is not a method allowed by the permit that is accurate enough to measure two significant figures below the value of 1.0, it will be the permittees' responsibility to provide documentation demonstrating that only one significant figure can accurately be reported.

For numbers that do not contain decimal points, the trailing zeros may or may not be significant. For example, "10" may be considered to be either one or two significant figures. The problem with rounding of ambiguous numbers is pervasive enough to cause EPA to recently change the MCL for arsenic in drinking water from 10 ppb to 0.010 ppm. To avoid confusion with permit limits that are multiples of 10, either specify the number of significant figures in a footnote or express the limit in scientific notation. Two digit whole numbers should be footnoted and larger numbers that are multiples of 10 should be in scientific notation. [e.g., 10 should be footnoted with "Limit given is expressed in two significant figures."; 760,000 should be 7.6×10^5]

It is important to follow a number of accepted mathematical conventions in order to properly calculate limits and report monitoring results. The following rules for significant figures, rounding and precision apply to measured values, such as concentration**,** and not to counted values, such as number of days, colony counts or conversion factors.

Significant Figures:
Regardless of the measuring device, there is always some uncertainty in a measurement. Significant figures include all of the digits in a measurement that are known with certainty as well as the last digit, which is an approximation.

Rules for Significant Figures:
1.) All non-zero digits (1-9) are to be counted as significant.
2.) All zeros between non-zero digits are always significant. Both 4308 and 40.05 contain four significant digits.
3.) For numbers that do not contain decimal points, the trailing zeros may or may not be

significant. The number 470,000 may have two to six significant digits.

4.) For numbers that do contain decimal points, the trailing zeros are significant. Both 0.360 and 4.00 have three significant digits.
5.) If a number is less than 1, zeros that follow the decimal point **and** are before a non-zero digit are not significant. Both 0.00253 and .0670 contain three significant digits.

Rounding:

Rounding may be necessary to properly calculate values to be used for permit limits and to report results. All calculations (i.e. averaging and multiplying) should be performed prior to any rounding taking place. While several rounding conventions exist, rounding as stated in Part 1050 B of Standard Methods for the Examination of Water and Wastewater (18^{th}, 19^{th} and 20^{th} ed.) is currently required for all methods found in that book. Those methods are frequently used for compliance monitoring. For consistency, DEQ should use these same rules (given below) for establishing permit limits, and encourage their use for reporting of all data.

Rules for Rounding

Examine the digit following (i.e., to the right of) the last digit to be reported. This digit is the one that is referred to as "being dropped" when rounding a number. Apply the following rules for rounding:

1.) If the digit being dropped is 1, 2, 3, or 4, leave the preceding number as it is. 20.3647 rounded to two significant figures, becomes 20.
2.) If the digit being dropped is 6, 7, 8, or 9, increase the preceding digit by one. 26.6462 and 26.9081, rounded to two significant figures, become 27 in both cases.
3.) If the digit 5 is being dropped, round off the preceding digit to the nearest even number (0 is considered an even number when rounding off): thus 2.25 becomes 2.2 and 2.35 becomes 2.4.

Example: Using two significant figures, 1048, 1053 and 1059 all round to 1000; 1060 rounds to 1100; 1153 rounds to 1200.

Precision:

Monitoring results should be reported with the same degree of precision that was achieved in the analysis/measurement of the value. This means that numbers resulting from calculations, including loadings, cannot be more precise than the raw data used in the calculations. Note: In cases where the permittee is allowed to treat a <QL as zero when averaging, that zero is to be considered as being "0.00".

Rules for Precision:

1.) For addition or subtraction, the answer can contain no more decimal places than the least precise measurement.
13.681 - 0.5 = 13.181 should be rounded off to the tenths place, with a correct answer of 13.2
2.) For multiplication or division, the least number of significant figures in any of the measurements determines the number of significant figures in the answer.
2.5 x 3.42 = 8.55 should be rounded off to two significant figures, with a correct answer of 8.6.

3.) Numbers such as conversion factors or number of days are counted numbers and are not considered when determining the number of significant figures or decimal places in the calculation.
4.) If both addition/subtraction and multiplication/division are used in a calculation, follow the rules for multiplication/division.

Example: Calculate the suspended solids mass loading.
Permit limit: 75 kg/day, Q = 0.67 MGD, C = 10.5 mg/L
3.785 kg/mg/L/MG = Unit conversion for one gallon of water to one liter.

Q x C x Unit Conversion = Mass Loading
0.67 x 10.5 x 3.785 = 26.627475 kg/day

Precision rule #2 applies.
The numbers 2 and 6 in the result, are the two significant digits.
The number 6 (in the tenths place) in the result, is rounded up. Increase the preceding digit by one. Enter 27 in the appropriate box.

Example: Calculate the 7-day average for ammonia
Permit Limit: 4.5 mg/L, sampled 4 times a week
C = 0.56, 0.93, 2.53, 6.92 mg/L

$$\frac{0.56 + 0.93 + 2.53 + 6.92}{4} = 2.735 \text{ mg/L}$$

Precision rules # 3 and # 4 apply (Note: The 4 in the denominator is a counted value).
The numbers 2 and 7 in the result, are the two significant digits.
The number 3 (in the hundredths place) in the result, is rounded down. Leave preceding number as is. Enter 2.7 in the appropriate box.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
Ellen Gilinsky, Ph.D., Director

Subject: Guidance Memorandum Number 04-2018
Requirements for VWPP to Impact Wetlands Within Storm Water BMPs

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director

Date: September 27, 2004

Copies: Rick Weeks, Deputy Regional Directors, Regional Water Permit and VWPP Managers, Jon VanSoestbergen

Summary:
This guidance is provided to the Central Office and Regional Office water permit staff concerning the requirements for a Virginia Water Protection Permit to impact wetlands that have developed within storm water BMPs permitted under VPDES storm water regulations.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at http://www.deq.state.va.us/water.

Contact information:
Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

VPDES AND VWPP PERMITS - STORM WATER BMPS

SUMMARY:

A VWP Permit may be required under certain circumstances for storm water BMPs when a maintenance plan is being established and a maintenance area is designated. For new BMPs constructed in state waters as part of a VPDES MS4 Permit Storm Water Management Program, this will generally occur as a matter of course in the VWP process. However, for new BMPs constructed from uplands, and for existing structures designated as BMPs by localities in the Storm Water Management Program required by a VPDES MS4 permit, VWP permitting requirements are less obvious and clarification is considered appropriate. This guidance provides such clarification. It should also be noted that not all BMP construction and/or maintenance activities are associated with VPDES MS4 permits. Some may be privately maintained features constructed historically without regulatory requirements or more recently under authority other than VPDES MS4 permitting requirements. It is assumed that these features will eventually require maintenance activity as well, independent of any regulatory maintenance mandate. This guidance should be used as a guide in addressing these situations. The following items summarize the critical decision issues of this guidance. Detailed discussion follows this section.

1. **New Purpose Built BMPs.** New storm water BMPs constructed in state waters are subject to VWP permitting. Preparation of a maintenance plan and designation of maintenance areas are permit requirements. To the extent that proposed maintenance is conducted in accordance with this plan and any further the conditions contained within the VWP permit, no additional permitting should be required. Of course, no permit would be required for purpose built BMPs constructed in an upland.

2. **Existing Purpose Built BMPs (with maintenance plans established under VPDES MS4 program)**. Depending on the nature of the existing maintenance plan, VWP program staff should review these BMPs for wetland impacts to document the designated maintenance area and determine if a VWP permit may be required. However, given the large number of large and medium MS4s, this effort could be extensive. More practically, VPDES MS4 program staff should coordinate with VWP program staff to ensure proper communication of any VWP requirements to permit applicants and current permittees. Also note that per 9 VAC 25-210-60, the following activity is exempt from permitting requirements:"8. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation **and utility structures (***emphasis added***)**." Given that these BMPS can be considered utility structures per the MS4 requirements, a VWP permit should not be required for their normal maintenance.

3. **Existing Purpose Built BMPs (with no maintenance plan)**. A VWP permit may be required to establish a maintenance plan and designate a maintenance area if maintenance work will involve dredging or excavating vegetated wetlands. However,

note that depending on the nature and extent of such activities, they may fall under the exemption to VWP permitting requirements noted above (9 VAC 25-210-60:8).

4. **Features redesignated as storm water BMPs**. State waters and wetlands (including borrow pits) are subject to VWP permitting to redesignate the existing feature as a BMP and to establish a maintenance plan and designate maintenance areas if maintenance work will involve dredging or excavating vegetated wetlands.

5. **BMPs that have been inadvertently colonized by vegetated wetlands.** Existing BMPs that have been colonized by wetland vegetation because of inadequate or nonexistent maintenance may be subject to VWP permitting and compensatory mitigation to restore the feature, establish a maintenance plan and designate a maintenance area if the wetland condition is now considered normal circumstances and the restoration and/or maintenance will involve dredging or excavation of vegetated wetlands. Note , however, that depending on the nature and extent of such activities, they may fall under the exemption to VWP permitting requirements noted above (9 VAC 25-210-60:8).

6. In general, maintenance activities within a designated maintenance area are not subject to VWP permitting. Maintenance activities outside of a designated maintenance are subject to VWP Program review and possible permitting.

BACKGROUND:

Based on the interconnections between certain authorities regarding impacts in wetlands contained in (1) the VPDES individual permit regulation for large and medium MS4s (9 VAC 25-31-120), (2) the VPDES general permit regulations for small MS4s (9 VAC 25-31-121 and 9 VAC 25-75-10), and (3) the VWPP regulation (9VAC 25-210), there have been concerns raised over the applicability of the VWPP regulation to facilities specifically designed as storm water BMPs. This concern also extends to manmade lakes that have historically been utilized for agricultural, aesthetic and/or recreational purposes and are now identified by local government as MS4 BMPs. As written, the VWPP regulation does not differentiate between natural, manmade or "accidental" wetlands with respect to the requirement for a permit. Similarly, there is no regulatory differentiation between BMPs constructed expressly for the purposes of storm water control versus pre-existing water features, such as borrow pits and lakes, that have been incorporated into local storm water plans.

The MS4s are required to maintain their storm water BMPs; however the maintenance approach and frequency is not specified and is left up to the MS4 to decide. Frequencies will differ based upon several site specific factors, including the drainage inputs. A maintenance plan should be developed that documents the required storage volume for purposes of either storm water quantity or quality control, whichever determines the storage volume, with appropriate hydrologic analyses to verify the required storage necessary to provide the water quality/quantity benefits. The plan should also designate the maintenance areas within the BMP needed to maintain the volume.

Growth of wetland vegetation, as well as the prevalence of sediments that hold water, is typically present in many of these BMPs, especially as they age, and the BMPs may need to be dredged/scraped of sediment build-up as part of routine maintenance to ensure proper storm water retention. This maintenance cleaning may therefore involve disturbing wetlands that are present within the BMP, thus possibly necessitating a VWP permit for wetland impacts. The VWP permit for wetland impacts associated with maintenance dredging will likely only be required for the initial maintenance cycle, when the wetland impacts have not previously been identified as maintenance areas. The interpretive difficulty arises because while the presumptive purpose of both of these programs is to maintain/improve water quality within the Commonwealth, one program encourages the removal of colonizing wetlands and the other program may require their protection depending upon their location and the purpose of the BMP. Wherever possible, MS4 maintenance plans should attempt to satisfy quantity/quality objectives while avoiding and minimizing impacts to surface waters and wetlands.

RELEVANT REQUIREMENTS OF VPDES STORM WATER PERMITS

VPDES individual and general permits for storm water require that structural and non-structural storm water BMPs be implemented and maintained at some non-specified interval. While many of these facilities were constructed for the express purpose of serving as a BMP, others were pre-existing water features that were retrofit (or simply designated) to serve also as a regional BMP. While single purpose BMPs, whether constructed in an upland or in-stream, will have a maintenance plan to maintain storage volumes, the pre-existing water features will likely not have such a plan.

Common requirements of MS4 permits include a program to continue implementation and maintenance of structural and nonstructural best management practices to reduce pollutants in storm water runoff from construction sites. The permittee is explicitly responsible for obtaining any required State or federal permits necessary to complete maintenance activities, including permits for land disturbance, wetlands disturbance, and dredging.

VWPP REQUIREMENTS FOR DISTURBING WETLANDS IN STORM WATER BMPS:

There is an exclusion in the VWPP regulation in 9VAC25-210-60, that states that "Any discharge, **other than an activity in a surface water governed by §62.1-44.15:5 of the Code of Virginia,** permitted by a Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9VAC25-31-10 et seq." does not require a VWPP permit. The activities governed by §62.1-44.15:5 as reference above include:

the dredging, filling or discharging of any pollutant into, or adjacent to surface waters;

otherwise altering the physical, chemical or biological properties of surface waters;

excavation in wetlands;

on or after October 1, 2001, conduct the following activities in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
2. Filling or dumping;
3. Permanent flooding or impounding; or
4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

If the BMP was constructed in state waters, it is clear that impacts to wetlands that colonize within the BMP are regulated. The only exception would be in maintenance areas within a BMP, if authorized as part of a VWP Permit. VWP permits contain special conditions for Stormwater Management Facilities, as follows :

1. Storm water management facilities shall be designed in accordance with best management practices and watershed protection techniques (i.e., vegetated buffers, siting considerations to minimize adverse effects to aquatic resources, bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources) that provide for long-term aquatic resources protection and enhancement, to the maximum extent practicable.

2. Compensatory mitigation for unavoidable impacts shall not be allowed within maintenance areas of storm water management facilities.

3. Maintenance excavation shall not exceed the original contours of the facility, as approved and constructed.

4. Maintenance within storm water management facilities will not require mitigation provided that the maintenance is accomplished in designated maintenance areas as indicated in the facility maintenance plan."

Also of note is the exclusion for maintenance of "utility structures" contained within the VWP permit regulation, 9 VAC 25-210-60, which excludes: "8. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation **and utility structures (***emphasis added***)**." Given that these BMPS can be considered utility structures per the MS4 requirements, a VWP permit should not be required for their normal maintenance.

Regardless of whether a BMP was constructed from uplands or within state waters, it should have a maintenance plan per the VPDES storm water regulations. Therefore, any wetland dredging or excavation that occurs within the designated maintenance area will not require a VWP permit and consequent compensation because the activity is covered by the VPDES storm water permit. However, disturbance of any native or colonizing wetlands outside of the designated maintenance area is a regulated activity.

Most of the ponds and lakes installed prior to the MS4 storm water regulation, but that are now designated as a BMP by the MS4 permittees, were installed for purposes other than storm water management. This would include lakes created for previous use as an agricultural water source or other purposes originating from damming a tidal or nontidal tributary and later identified as a BMP for a municipality. Any dredging of such BMPs, including wetland or open water dredging, to change bottom contours to improve boat access, the open water "aesthetic", swimming, install beaches, etc., that provides storage capacity in excess of the water quality/quantity storage volume is subject to a VWP permit. Also, if the pre-existing facility does not have a maintenance plan under its VPDES storm water designation, then it should be required to establish one as a requirement of the MS4 permit. The VPDES permit writer should coordinate with the VWPP Program staff to ensure wetland issues and concerns are addressed in the maintenance plan, and to eliminate duplication of permitting requirements by addressing wetlands concerns within the MS4 permit.

Borrow pits that result from a previous borrow operation and are secondarily converted to a storm water BMP are covered under the above rules. Abandoned borrow pits that subsequently colonize with wetland vegetation are regulated as isolated wetlands. If they are converted to a BMP, any wetlands outside of maintained areas identified in the maintenance plan for the BMP would be regulated under the VWPP program. Disturbance of wetlands within the designated maintenance area would not require VWP permit. If there is no maintenance plan and wetland areas are to be disturbed, then a maintenance plan should be required under the VPDES permit with VWP Permit staff involvement.

We also note that under certain circumstances storm water BMPs can serve in part as compensation for on-site wetland impacts resulting from project construction. Any areas within the BMP that were counted as compensation (i.e. wetland benches constructed around the edge of the BMP) are not part of the maintenance area of the BMP and cannot be disturbed as a condition of the VWP permit issued for the project.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
Larry G. Lawson, P.E., Director

Subject: Guidance Memorandum Number 04-2009
Guidance on Wetlands Created During Mining Operations

To: Regional Directors

From: Larry G. Lawson, P.E., Director

Date: February 24, 2004

Copies: Rick Weeks, Kathy Frahm, Deputy Regional Directors, Regional VWPP Managers, Ellen Gilinsky

Summary:
This guidance is provided to the Virginia Water Protection Permit (VWPP) Program staff concerning the regulation of waterfilled depressions created in dry land during construction and excavation operations permitted by the Department of Mines, Minerals and Energy (DMME) as part of a surface mining operation. Per the VWPP regulations, and in accordance with similar federal guidance, such areas are not to be regulated under the VWPP program until the operation ceases and the site is abandoned.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at http://www.deq.state.va.us/water.

Contact information:
Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:
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DEQ GUIDANCE ON REGULATION OF SURFACE WATERS CREATED DURING ACTIVE SURFACE MINING OPERATIONS UNDER THE VIRGINIA WATER PROTECTION PERMIT PROGRAM

Background

Section 62.1-44.15:5 D 5 of the Code of Virginia states in part that: "…..The Board shall utilize the U.S. Army Corps of Engineers' "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" as the approved method for delineating wetlands. The Board shall adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices. The Board shall also adopt guidance and regulations for review and approval of the geographic area of a delineated wetland. Any such approval of a delineation shall remain effective for a period of five years; however, if the Board issues a permit pursuant to this subsection for an activity in the delineated wetland within the five-year period, the approval shall remain effective for the term of the permit. Any delineation accepted by the U.S. Army Corps of Engineers as sufficient for its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland."

The Virginia Water Protection Permit Program Regulation states in 9 VAC 25-210-45, Wetland Delineation: "Each delineation shall be conducted in accordance with the USACE "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual). The Federal Manual shall be interpreted in a manner consistent with USACE guidance and the requirements of this regulation, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices."

The Corps of Engineers issued guidance clarifying the definitions of waters of the United States under their Section 404 regulatory program (33 CFR Parts 320 through 330) as a Final Rule published in the Federal Register (Vol 51, No 219) on November 13, 1986. This final rule specifically addressed the issue of surface waters created during mining operations, as follows: "We generally do not consider the following to be 'Waters of the United States'……..Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purposes of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States…"

VWPP Program Implications

In accordance with our statutory and regulatory directive to adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices, this guidance is being issued to clarify how to consider surface water areas, including wetlands, that are formed incidentally out of uplands as part of a permitted construction or excavation activity for the purposes of obtaining fill, sand, or gravel. In order to remain consistent with the federal implementation of delineation practices, these areas would not be considered jurisdictional under the VWPP program as long as the permit for the construction or excavation is active. Once that permit expires, and the site is abandoned, then any areas that meet the definitions of surface waters regulated by the VWPP program would be subject to that program.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
Larry G. Lawson, P.E., Director

Subject: Guidance Memorandum Number 04-2007
Avoidance & Minimization of Impacts to Surface Waters

To: Regional Directors

From: Larry G. Lawson, P.E., Director

Date: February 6, 2004

Copies: Rick Weeks, Kathy Frahm, Deputy Regional Directors, Regional VWPP Managers, Ellen Gilinsky

Summary:
This guidance is provided to the Central Office and Regional Office Virginia Water Protection Permit (VWPP) Program Staff concerning the consideration of avoidance and minimization of impacts to surface waters as part of the VWPP application review process. Per the VWPP regulations, applicants must first demonstrate that all practicable efforts to minimize unavoidable impacts to state waters, including wetlands, have been taken into consideration and then provide a plan for compensation for all unavoidable impacts.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at http://www.deq.state.va.us/water.

Contact information:
Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

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DEQ GUIDANCE ON AVOIDANCE AND MINIMIZATION OF IMPACTS TO STATE WATERS

I. INTRODUCTION

As part of the permit evaluation process used to authorize a particular project proposing to impact state waters (including wetlands), Virginia Water Protection Permit (VWPP) regulations incorporate, by reference, the mitigation sequencing guidelines from the Clean Water Act, also known as the Section 404(b)(1) guidelines (reference 9 VAC 25-210-115A). These implementing guidelines for the Clean Water Act (40 CFR 230.10) state that the burden of proof for demonstrating compliance with the Section 404(b)(1) guidelines is the responsibility of the applicant, not the permitting entity. Applicants must (1) establish that avoidance of impacts to state waters, including wetlands is not practicable; (2) demonstrate that all practicable efforts to minimize unavoidable impacts to state waters, including wetlands, have been taken in project design and construction plan; and (3) provide a plan for compensation for all unavoidable impacts. Note that compensatory mitigation is not considered as a method to reduce environmental impacts, but rather as a means to replace lost functions and values of those impacts that cannot be first avoided and minimized.

The VWPP regulations define "avoidance", "minimization", and "practicable" as follows (9 VAC 25-210-10):

- "Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment;
- "Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation; and,
- "Practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. [Note that in order to be practicable, an alternative must be both available to the permit applicant and capable of fulfilling the overall project purpose.]

These definitions are similar to those found in federal regulations and guidance. The following document is intended to provide guidance to VWPP project managers, applicants for VWP permits, and others on how these factors are considered within the framework of the Virginia Water Protection Permit Regulation.

II. PROJECT REVIEW CONSIDERATIONS

The statutory purpose of the VWPP program is to ensure that there is no net loss of wetlands through permitted impacts and to ensure that permits are only issued if the State Water Control Board determines that the cumulative impacts will not cause or contribute to a significant impairment of state waters or fish and wildlife resources. Following these guidelines will help assure that our aquatic resources are protected to the maximum extent practicable while allowing property owners reasonable use of their property.

A. WATER DEPENDENCY AND PROJECT PURPOSE AND NEED

Water dependency and a project's purpose are entwined, as the project's purpose is the foundation for evaluating water dependency and, subsequently, avoidance and minimization. Water dependent projects are defined by the Section 404(b)(1) guidelines as those activities that require "access or proximity to or siting within the wetland to fulfill [the project's] basic purpose." Examples of water dependent projects include boat ramps, bulkheads, marinas, piers, docks, or similar structures.

Courts generally have given significant discretion to the regulatory agencies regarding water dependency and purpose and need. In *Louisiana Wildlife Federation v. York*, the Fifth Circuit Court of Appeals held that "not only is it permissible for the [U.S. Army Corps of Engineers (the Corps)]to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable." In *Friends of the Earth v. Hintz*, the Ninth Circuit Court of Appeals affirmed that the Corps had correctly determined that the siting of a saw mill and log export facility adjacent to a harbor was a water dependent activity, and, therefore, access to a special aquatic site was necessary.

In light of the Section 404(b)(1) guidelines and relevant court rulings, VWPP project managers must give full consideration to the project applicant's stated purpose and need when making a water dependency determination. If a project is determined to be water dependent, then it is presumed that alternatives that completely avoid impacts to the aquatic ecosystem are not practicable, and the review can move to other factors to further minimize impacts prior to considering compensation. If a project is determined to be non-water dependent, then the applicant must clearly demonstrate that there are no other practicable alternatives to the proposed impacts. VWPP project managers should explore other practicable factors (i.e. design changes, siting changes, project reconfiguration, different construction practices, etc.) that first avoid the proposed impact, then minimize those unavoidable impacts (see Section C of this document).

Note that while the Section 404(b)(1) guidelines as well as the VWPP regulations ask the applicant to provide the purpose and need for the project as part of the Joint Permit Application (JPA), we normally do not evaluate the need for a project (for instance, multiple shopping centers in close proximity to each other) in making a permit determination. Exceptions are in the consideration of water withdrawal projects, when we assess the need for additional water as part of the purpose of the project. However, part of the Corps' public interest review considers project need based upon the information provided in the JPA and any subsequently submitted additional information.

B. Alternatives Analysis and Investment-Backed Expectations for Non-Water Dependent Projects

Once it is determined that a project is non-water dependent, it is the responsibility of the applicant to perform an alternatives analysis to clearly demonstrate that their project is the least environmentally damaging practicable alternative in light of the applicant's overall project purpose. Remember that DEQ must take into account the objectives of the applicant's project as presented, and not change the nature of the project (i.e. substitute apartments for single family housing), and thus its impacts, by changing its stated purpose. However, we can ask an applicant to reconfigure their project, for example the number or placement of dwelling units, to further avoid and minimize wetland impacts if they will still realize economic gain from the project as reconfigured.

The alternatives analysis is a tool to identify the practicable alternative with the least environmental impact that also meets the project's overall purpose. The methods used to conduct an alternatives analysis must evaluate the practicability of each of the alternatives independently, rather than relative to the preferred alternative. The alternatives analysis must consider avoidance and minimization of impacts to aquatic resources during the evaluation of each alternative, unless sufficient justification is provided that an alternative is not practicable.

Section 404(b)(1) guidelines state that a practicable alternative may include "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity" (40 CFR 230.10(a)(2)). In *Bersani v. EPA*, the Second Circuit Court of Appeals held that the practicable alternatives test relative to the availability of sites should be conducted at the time an applicant enters the market for a site, instead of at the time it applies for a permit. The courts often, but not always, support the position that if a property with less environmental impact was available at the time of purchase of the subject property, then a less environmentally damaging alternative

did exist. Note that this is often difficult to prove, especially for properties that have been owned for a long period of time but are just now being developed.

When taking cost into consideration for the alternatives analysis, the preamble of the Section 404(b)(1) guidelines states that "[t]he determination of what constitutes an unreasonable expense should generally consider whether the project cost is substantially greater than the costs normally associated with the particular type of project under consideration." The preamble further states that "if an alleged alternative is unreasonably expensive to the applicant, the alternative is not practicable." The most important point regarding cost considerations is that the Section 404(b)(1) guidelines are not meant to consider financial standing of an individual applicant, but rather the characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations. Note that we rely on the applicant to provide this economic information, but that we may need to involve independent review depending on the complexity of the information presented.

Based upon federal case law on this point (specifically, *Bersani v. EPA* and *National Wildlife Federation* v. *Whistler)*, a project's overall purpose should be established first, then a list of alternative sites meeting the project's purpose would be evaluated. Ideally, the preferred alternative should be selected that meets both the project purpose and has the least environmental impact. However, usually this sequential evaluation must occur in reverse, as the applicant may own a property for a period of time prior to establishing the purpose for a project on that property.

Many times, an entity already owns, leases, contracts to purchase, or otherwise has control over a particular parcel of land. To maximize an investment-backed expectation, the entity identifies a project that serves a community need (i.e., housing, retail, institutional, or other socioeconomic factor), then seeks to fulfill this need by proposing to develop the parcel. At this point, an alternatives analysis is conducted to determine that the preferred alternative (i.e., using this site for that particular community need) will meet the project purpose at the exclusion of other alternatives. Often, the argument for pre-selecting the preferred alternative is that the entity is already in possession of or controls the land, the land may already have the required land use zoning, or the entity is attempting to realize an investment-backed expectation. This situation is precisely what the courts addressed in *Bersani*: that the practical alternatives test should be conducted at the time the applicant entered the market for a site. However, the courts have also addressed the need to consider investment-backed expectations. In *Penn Central v. New York City*, the court established a multi-factor balancing test, where the economic impact and character of the government action is balanced against the extent to which the government action interferes with reasonable investment-backed expectations of the regulant. In *Claridge v. New Hampshire Wetlands Board*, the court held that "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights...." *Claridge* is further supported by *City of Virginia Beach v. Bell*, where the court denied a takings claim by the plaintiff who acquired a parcel two years after a municipal sand dune protection ordinance had been adopted. In this case, the court held that "[plaintiffs] cannot suffer a taking of rights never possessed."

Focusing on an investor's actual expectations makes good sense. If an investor knows about restrictions already in place when he purchases property, he cannot reasonably assert that the restrictions result in an unfair taking or that he is being asked to avoid impacts to an unreasonable extent. In essence, a property owner cannot complain of regulatory limits on the use of the property that the owner knew about at the time of purchase, or that the owner should have known about. Conversely, if regulations have changed in the time since the owner purchased the property, then he cannot have known at the time of purchase of the difficulties in developing the parcel due to new laws and regulations currently in place. Therefore, the applicant's investment-backed expectations get more consideration than another applicant, who purchased property with knowledge of regulatory constraints.

In summary, given regulatory requirements and the outcome of these various court cases, the VWPP project manager should ask the applicant to evaluate, and the project manager should consider, <u>all practicable alternatives</u> for a project that achieves the applicant's stated purpose. Moving the proposed project to another parcel that would result in less environmental impact while achieving the overall project purpose is an alternative that must be considered, if practicable. However, the VWPP project manager

must be mindful that using another parcel of land for a particular project is not practicable in every instance. The VWPP regulations and incorporated federal guidelines also require DEQ to take into account the applicant's investment backed expectations at the time of the purchase.

C. Avoidance & Minimization

Once the least environmentally damaging practicable alternative is identified, design and construction plans are reviewed for modifications that can further avoid or minimize environmental impacts. As each project has site-specific issues and constraints, it is impossible to establish a bright line to determine when enough avoidance and minimization has occurred. The following factors should be considered based upon data provided by the applicant: cost to develop the project on the chosen property versus cost to develop the project on another property; reasonable investment-backed economic expectations; logistics and feasibility; overall project purpose, and whether other alternatives would have less of an environmental impact.

The VWPP Regulations state the following (9 VAC 25-210-115A):

Avoidance and minimization opportunities shall be evaluated as follows: The applicant must demonstrate to the satisfaction of the board that practicable alternatives, including design alternatives, have been evaluated and that the proposed activity, in terms of impacts to water quality and fish and wildlife resources, is the least environmentally damaging practicable alternative. The applicant must also demonstrate to the satisfaction of the board that all steps have been taken in accordance with the Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register, December 24, 1980) to first avoid and then minimize adverse impacts to surface waters to the maximum extent practicable. Measures, such as reducing the size, scope, configuration, or density of the proposed project, that would avoid or result in less adverse impact to surface waters shall be considered to the maximum extent practicable.

The Section 404(b)(1) guidelines allow the Corps to require "minor project modifications" to minimize wetland impacts. "Minor project modifications" are defined as those that are feasible (cost, constructability) to the applicant and that will generally meet the applicant's purpose. This includes reduction in scope and size, changes in construction methods or timing, operation and maintenance practices, and other changes reflecting a sensitivity to environmental impacts. The federal guidelines also address what constitutes an unreasonable expense when evaluating the practicability of project options. They are to consider whether the project cost would be substantially greater than the costs normally associated with a particular type of project (or the investment return substantially lower). If an alleged alternative is unreasonably expensive to the applicant, the alternative is not practicable. For a developer, the federal guidelines state that the primary test of whether a project is still viable is, after all the costs have been paid from project revenues, the remaining value of the project is sufficiently high to proceed. Again, we rely on the applicant to provide financial information on the economic viability of the project, as modified. In complex cases independent review of these economic figures may be warranted.

The VWPP project manager should consider a general list of questions when performing the avoidance and minimization review. The list of questions below is not intended to be all-inclusive, but is based on permit application review practices employed by various state and federal regulatory agencies.

1. On-Site Avoidance

- Spatial or dimensional changes to structure lay-out
  - Can another vertical level be added to a building to decrease the overall building footprint?
  - Can the building footprint be reduced and still achieve the project's purpose and need?
  - Can a building be repositioned on the parcel to reduce or eliminate environmental impacts?

- Can multiple structures be clustered to reduce or eliminate impacts?
- Can road or utility alignments be reconfigured?
- Can spans and bridges be used instead of culverts?

- Site engineering changes
  - Can 2:1 side slopes be used instead of gentler slopes?
  - Can retaining walls be used instead of slopes?
  - Can grading be minimized by incorporating natural topography?
  - Can more trees and vegetation be preserved?
  - Can lot layout be reconfigured?
  - Can state waters, including wetlands, be concentrated into subdivision "common areas"?
- Incorporate Low Impact Development (LID) Techniques
  - Can the amount of impervious surface be reduced to preserve as much natural cover as possible, especially for soils in hydrologic groups A and B?
  - Can stormwater management facilities be sited outside of streams and wetlands?
  - Can the use of pipes be minimized?
  - Can downspouts be directed to vegetated areas instead of impervious areas?
  - Have direct stormwater impacts to streams and wetlands been minimized to the maximum extent practicable?
  - Can impervious areas be disconnected from one another by retaining natural cover?
  - Can the travel time of water off site (time of concentration) be increased?
  - Can engineered swales for stormwater conveyance be used instead of or to reduce curb and gutter?

2. On-Site Minimization

- Can some of the above listed suggestions be used to further minimize impacts?
- Can directional drilling be used to install underground utilities across a State water instead of excavation and backfill?
- Can equipment fitted with low pressure tires or tracks be used?
- Can any permanent impacts (e.g. access roads) be converted to temporary impacts?
- Can construction staging or stockpiling of materials occur in areas outside of State waters?

In practice, application of the Section 404(b)(1) Guidelines is proportional to the significance of the environmental impact proposed by a permit application. For example, the detail of information required of an applicant with regard to such requirements will be much greater if the proposed environmental impacts are significant. A less detailed analysis would be required for permit proposals that have impacts which are minor in nature.

D. Compensation Requirements

Avoidance and minimization of impacts must be accomplished before considering compensatory mitigation for impacts to state waters, including wetlands. Note, however, that because of the permit process, the information needed to evaluate the entire mitigation hierarchy is submitted at the same time. As a practical matter, staff work with the applicant, both before and after an application is submitted, to avoid and minimize wetland impacts and to finalize the mitigation package.

The VWP regulation specifies how compensation proposals should be considered (excerpted from 9 VAC 25-120-115):

B. Compensatory mitigation proposals shall be evaluated as follows:

1. On-site, in-kind compensatory mitigation, when available, shall be deemed the most ecologically preferable form of compensation for project impacts, in most cases. However, off-site or out-of-kind compensation opportunities that prove to be more ecologically preferable or practicable may be considered. When the applicant can demonstrate satisfactorily that an off-site or out-of-kind compensatory mitigation proposal is practicable and ecologically preferable, then such proposal may be deemed appropriate for compensation of project impacts.
2. Compensatory mitigation for unavoidable project impacts may be met through wetland or stream creation or restoration, the purchase or use of mitigation bank credits, or a contribution to an approved in-lieu fee fund. Compensation may incorporate preservation of wetlands or streams or preservation or restoration of upland buffers adjacent to state waters when utilized in conjunction with creation, restoration or mitigation bank credits as appropriate to ensure protection or enhancement of state waters or fish and wildlife resources and their habitat.
3. Generally, preference shall be given in the following sequence: restoration, creation, mitigation banking, in-lieu fee fund. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland or stream acreage and function.
C. No net loss. Compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and functions. Compensatory mitigation ratios appropriate for the type of aquatic resource impacted and the type of compensation provided shall be applied to permitted impacts to help meet this requirement. Credit may be given for preservation of upland buffers already protected under other ordinances to the extent that additional protection and water quality and fish and wildlife resource benefits are provided.
D. Alternatives analysis [note, this refers to compensation alternatives in this context]
1. An alternatives analysis shall be required to justify that the following alternatives are ecologically preferable and practicable compensatory mitigation options to on-site, in-kind compensation: off-site including purchase or use of mitigation bank credits, or contribution to an in-lieu fee fund; or out-of-kind.
2. An alternatives analysis shall include, but is not limited to, the following criteria, which shall be compared between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source; hydrologic regime; watershed; functions and values; vegetation type; soils; constructability; timing; property acquisition; and cost. The alternatives analysis shall compare the ability of each compensatory mitigation option to replace lost acreage and function.

The federal wetland programs consider similar criteria in evaluating compensatory mitigation. In 1990, the Corps and the U.S. Environmental Protection Agency (EPA) issued a Memorandum of Agreement (MOA) formalizing the three-step sequencing requirements of first avoiding, then minimizing, and finally compensating for impacts to the aquatic community. The 1990 MOA outlines a preference for compensation to occur on-site, then off-site. In deciding whether the proposed compensation is acceptable relative to the existing functions and values of the aquatic community proposed to be impacted, the 1990 MOA outlines a preference for in-kind replacement of lost functions and values over out-of-kind replacement. In 1993, the Corps and EPA issued a Memorandum to the Field that provided additional guidance for reviewing projects under the Section 404(b)(1) guidelines. This memorandum states that it is inappropriate to consider compensation before avoidance, minimization, and alternatives analyses have occurred; meaning compensation cannot be used as a tool to "minimize" proposed impacts (as summarized in Dennison 1997). The guidance contained in these MOA's is included as part of the Section 404(b)(1) guidelines and has been incorporated by the State Water Control Board for implementation of the VWP permitting requirements.

III. SUMMARY

No bright line exists to determine when enough avoidance and minimization for a particular project has been completed. Many factors must be considered together on a project-specific basis to determine when this criteria has been met, including the following:

- Physical Constraints
  - Property boundaries
  - Adjacent land uses
  - Presence of underground or overhead utilities
  - Presence of easements
  - Site topography
  - Site geology
- Other Conflicting Requirements
  - Local government ordinances (e.g. set-back requirements and building codes)
  - Other state and federal environmental regulations
  - Other on-site environmentally sensitive features
- Design and Construction Considerations
  - Effects on public health, public welfare, and public safety
  - Available technology
  - Construction or industry standards
  - Available equipment

It is the VWPP project manager's responsibility to review the proposed project in light of the applicant's stated purpose. This review should include consideration of all practicable alternatives, including other parcels, for avoidance and minimization based upon the site-specific details of the project. It is not the VWPP project manager's responsibility to substitute some other project purpose or to maximize the applicant's return on his investment. Each project's purpose, alternatives, avoidance and minimization evaluation, and, subsequently, appropriate compensation should be reviewed in light of the proposed impacts (direct, indirect, and cumulative) to the aquatic community.

APPENDIX A – SUMMARY OF RELEVANT CASES

In ***Louisiana Wildlife Federation v. York*** (761 F.2d 1044, 5th Cir. Ct., 1985), the Fifth Circuit Court of Appeals affirmed the issuance of several Section 404 permits for conversion of 5,000 acres of wetlands to agricultural uses (soybean farming). The U.S. Army Corps of Engineers (the Corps), in reviewing the project, determined that the proposed activity was non-water dependent, and, therefore, a practicable alternative not involving wetland impacts existed. After analysis of alternatives, the Corps determined that "based on considerations of costs, reasonable availability, and the nature of the proposal itself, there are no practicable alternatives that will allow the applicant to achieve the basic purpose of the proposed project" (as quoted in Steinberg, 1989). The court disagreed with the plaintiff's contention that alternatives to the proposed project should not be reviewed in light of the project's purpose and need. On this issue, the appellate court held that "not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."

In ***Friends of the Earth v. Hintz*** (800 F.2d 822, 9th Cir. Ct., 1986), the Ninth Circuit Court of Appeals affirmed that the Corps had correctly determined that the siting of a saw mill and log export facility adjacent to a harbor was a water dependent activity, and, therefore, access to a special aquatic site was necessary. Further, the court held that the Corps did not err in its evaluation (and subsequent dismissal) of four alternatives based upon cost, existing technology, and logistics in light of the applicant's purpose and need. Prior to receiving a permit from the Corps, the landowner began filling a 17-acre tract — containing intertidal mudflats — for log export storage and sorting. The landowner had previously received a shoreline conditional use permit from the state, and an estuary management plan designated the log sorting yard as being outside of jurisdictional wetlands. The landowner neither applied for nor obtained a Corps permit. The Corps was subsequently notified of the fill activity, determined that the fill was a regulated activity, and began negotiating with the landowner for an "after-the-fact" permit that included compensatory mitigation. Further, the Corps determined that the log sorting was a water-dependent use and that no feasible alternatives existed.

In ***Bersani v. EPA*** (850 F.2d 36, 2nd Cir. Ct., 1988), the Second Circuit Court of Appeals held that the U.S. Environmental Protection Agency's (EPA's) "market entry theory" — which looked at the availability of alternative sites at the time the developer entered the market — was applicable and consistent with both regulatory language and past practice. *Bersani* involved the attempt by Pyramid Companies to construct a shopping mall on an 82-acre site in South Attleboro, Massachusetts. The site contained approximately 50 acres of wetlands (known as Sweedens Swamp), and the site development plan proposed filling just over 32 acres of wetlands, enhancing 13 acres of wetlands for wildlife, and preserving 4 acres of wetlands. Further, the plan proposed an additional 36 acres of off-site wetland creation to offset project impacts. EPA vetoed the approval by the Corps because EPA found that an alternative site had been available to Pyramid at the time it entered the market to search for a site. The trial court agreed with EPA, and held that Pyramid failed to consider available alternatives at the time it entered into the market to build a shopping mall. The appeals court affirmed the trial court's decision.

In ***City of Virginia Beach v. Bell*** (255 Va. 395; 498 S.E. 2d 414, 1998; *cert. denied*, 119 S. Ct. 73), the Supreme Court of Virginia reversed the lower court's decision, and held that a compensable regulatory takings — under either the U.S. Constitution (5th and 14th amendments) or the Virginia Constitution (Article 1, Section 11) — did not occur when the local government denied a permit for beachfront development under the City's Coastal Primary Sand Dune Zoning Ordinance. The Coastal Primary Sand Dune Zoning Ordinance was modeled after a state law designed to "preserve and protect coastal primary sand dunes and beaches and to prevent their despoliation and destruction and whenever practical to accommodate necessary economic development in a manner consistent with the protection of such features." The landowner appealed the permit denial to the Virginia Marine Resources Commission (VMRC), which also denied the permit application, then appealed the VMRC decision to state Supreme Court. The Supreme Court of Virginia held that the ordinance at issue in this case "predated the

landowner's acquisition of the property. Therefore, the 'bundle of rights' under which [the landowner] acquired upon obtaining title to the property did not include the right to develop the [property] without restrictions. Thus, because the regulatory restriction was in [the landowner's] chain of title, the City did not deprive [the landowner] of the right to develop the property freely since that right was never [the landowner's] to lose."

In ***Claridge v. New Hampshire Wetlands Board*** (125 N.H. 745; 485 A.2d 287, 1984), the Supreme Court of New Hampshire affirmed the lower court's decision, and held that a compensable regulatory takings — under either the U.S. Constitution (5th and 14th amendments) or the New Hampshire Constitution (Article 12, Part 1) — did not occur when the local government denied a permit for filling wetlands for the purpose of installing a septic tank and leachfield. The septic tank and leachfield installation was needed to construct a single family dwelling on the property, and local ordinances required compliance with a state regulation that septic tank/leachfields adhere to a minimum 75-foot set-back from surface waters. Most of the property in question bordered a tidal creek, and was composed of saltmarsh vegetation and woods. The landowner appealed the permit denial to the lower court, which appointed a Special Master to review the case. During discovery, it was revealed that the landowner had received a letter from the locality, prior to purchasing the property in question, advising that any proposed fill in wetlands would require the locality's approval. Subsequently, the Special Master recommended that denial of the permit "was a valid exercise of police powers and did not require compensation." The Supreme Court of New Hampshire held that "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights." The state Supreme Court further held that "[t]he State cannot be guarantor, via inverse condemnation proceedings, of the investment risks which people choose to take in the face of statutory or regulatory impediments."

In ***National Wildlife Federation v. Whistler*** (27 F.3d 1341, 8th Cir. Ct., 1994), a land development company sought permission from the Corps to provide access to the Missouri River from their planned housing development. River access included re-opening an old river channel, which had converted over time from deep water habitat to wetlands. The project proposed to remove an earthen roadway, dredge and widen the old river channel, widen the connection between the old channel and the Missouri River, and replace 200 feet of river bank along the Missouri River. The dredging activity would convert 14.5 acres of wetland back to deep water habitat. In reviewing the permit application, the Corps determined that the planned community was located on uplands, and construction of the housing development could proceed without a permit. Given this fact, the Corps further determined that the project's purpose was to provide boat access from housing lots to the Missouri River, and, was, therefore, a water-dependent activity. Based upon these findings, the Corps issued a Section 10 (Rivers and Harbors Act, *33 USC § 403*) permit with 42 conditions, including the requirement to enhance an existing 20-acre wetland area by providing it with year-round water and saturated soil conditions. An adjacent landowner, who was also a member of the National Wildlife Federation, argued that the Corps failed to perform an alternatives analysis by not considering a nearby public boat ramp as water access for the planned development, and that the Corps permit decision was arbitrary and capricious. The lower court dismissed the plaintiff's argument, citing *Louisiana Wildlife Federation, Inc. v. York*'s reasoning (see above) for determining a project's purpose and need, and the Eighth Circuit Court of Appeals affirmed the lower court's decision.

In ***Penn Central Transportation Co. v. New York City*** (438 U.S. 104; 98 S. Ct. 2646, 1978), New York City's Landmarks Preservation Commission rejected a plan to construct a multistory office building over Grand Central Terminal, citing the locality's Landmarks Preservation Law. Under the Landmarks Law, Grand Central Terminal, which is owned by the Penn Central Transportation Co., was designated a "landmark" and the block it occupies a "landmark site." Penn Central, though opposing the "landmark" designation before the Commission, did not seek judicial review of the final designation decision. However, once plans to construct the office building were rejected, Penn Central brought suit in state court claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment.

The trial court's decision was reversed on appeal, with the New York Court of Appeals ultimately concluding that there was no "taking" since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. Further, the appellate court held that there was no denial of due process because (1) the same use of the terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the terminal itself; (3) even if the terminal could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the terminal; and (4) the development rights above the terminal, which were made transferable to numerous sites in the vicinity, provided significant compensation for loss of other rights above the terminal itself. On a writ of certiorari to the U.S. Supreme Court, that Court characterized its past takings decisions as "essentially ad hoc, factual inquiries." The Court created a balancing test for determining when a regulation constituted a taking. The factors were: (1) "[t]he economic impact of the regulation on the claimant," (2) "particularly, the extent to which the regulation has interfered with distinct, investment-back expectations," and (3) "the character of the governmental action."

APPENDIX B - REFERENCES USED

Bersani v. EPA. 1988. 850 F.2d 36, 2nd Cir. Ct.

City of Virginia Beach v. Bell. 255 Va. 395; 498 S.E. 2d 414; *cert. denied*, 119 S. Ct. 73 (1998).

Claridge v. New Hampshire Wetlands Board. 1984. 125 N.H. 745; 485 A.2d 287.

Dennison, M.S. 1997. Wetland Mitigation: Mitigation Banking and Other Strategies for Development and Compliance. Rockville, Maryland: Government Institutes. 299 pp including appendices.

Echeverria, John D. 2001. *It Comes Down to the Investor's Expectations* (In response to a piece by Eric Grant, co-counsel for Palazzolo in *Anthony Palazzolo v. Rhode Island*). Georgetown Environmental Law & Policy Institute. http://www.law.georgetown.edu/gelpi/papers/investors.htm

Economic & Planning Systems, Inc. 1999. Economic Analysis in the Context of 404(b)(1) Alternatives Analysis. White Paper prepared for U.S. Army Corps of Engineers, San Francisco Bay District. 16 pp plus appendices.

Friends of the Earth v. Hintz. 1986. 800 F.2d 822, 9th Cir. Ct.

Louisiana Wildlife Federation v. York. 1985. 761 F.2d 1044, 5th Cir. Ct.

Meagher, John W. 1986. Federal Mitigation Regulations. In, Proceedings of the National Wetland Symposium: Mitigation of Impacts and Losses, J.A. Kusler, M.L. Quammen and G. Brooks, eds.; ASWM Technical Report No. 3, 1988, 460 pp.

National Wildlife Federation v. Whistler. 1994. 27 F.3d 1341, 8th Cir. Ct.

Penn Central Transportation Co. v. New York City. 1978. 438 U.S. 104; 98 S. Ct. 2646.

Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. 40 CFR Part 230.

Steinberg, R.E. 1989. Wetlands and Real Estate Development Handbook. Rockville, Maryland: Government Institutes. 159 pp.

U.S. Army Corps of Engineers and U.S. Environmental Protection Agency. 1993. Memorandum to the Field: Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements. Washington, DC.

U.S. Army Corps of Engineers and U.S. Environmental Protection Agency. 1990. Memorandum of Agreement Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines. Washington, DC.

Virginia Water Protection Permit Regulations. 2001. 9 VAC 25-210 *et seq*.

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
Larry G. Lawson, P.E., Director

Subject: Guidance Memorandum Number 04-2004
Permit Reviews and Issuance for VWPP Applications Involving Water Withdrawal and Minimum In-Stream Flows

To: Regional Directors

From: Larry G. Lawson, P.E., Director

Date: January 20, 2004

Copies: Rick Weeks, Terry Wagner, Deputy Regional Directors, Regional VWPP Managers, Ellen Gilinsky, Joe Hassell, Brenda Winn, and Cindy Berndt

Summary:

This guidance provides guidelines to the Central Office and Regional Office Virginia Water Protection Permit Program Staff on how to assign responsibility for the processing of water withdrawal and minimum in-stream flow project applications. These guidelines should aid regional and central office VWPP staff in assuring that permit applications for water withdrawals are processed in the most efficient manner with a high level of customer service.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at http://www.deq.state.va.us/water.

Contact information:
Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, It does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Guidance on Permit Reviews and Issuance for VWPP Applications Involving Water Withdrawal and Minimum In-Stream Flows

As noted in the current version of the VWPP Program Permit Manual, applications for water withdrawal projects are typically processed by Central Office staff, but may also be processed at the Regional Offices as needed. Due to recent changes in responsibilities of several central office personnel, we will need to rely more on the processing of these applications by the appropriate Regional Office, with guidance from Central Office VWPP Program and Water Resources staff. We are therefore providing the following guidelines with regard to processing water withdrawal and minimum in-stream flow project applications:

1. For minor water supply projects (i.e., municipal 'run-of-the-river'), golf courses, dam construction, dam removal, and dam maintenance: Regional VWPP staff should process the permit application.

2. For major water supply projects (i.e., multi-county or regional storage), reservoirs, power plants, and industrial impoundments/intakes/withdrawals: Central Office VWPP staff will process the permit application.

3. For all projects having water withdrawal and/or minimum in-stream flow components, Joe Hassell at Central Office will provide technical guidance and withdrawal limitations for the individual permit conditions. Joe should become involved with the project at the pre-application stage in order to advise on appropriate limits.

These guidelines should aid regional and central office VWPP staff in assuring that permit applications for water withdrawals are processed in the most efficient manner with a high level of customer service. When questions arise concerning a specific application or the correct processing office, please call either Joe Hassell (804-698-4072) or Brenda Winn (804-698-4516).

Memorandum

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION
Larry G. Lawson, P.E., Director

SUBJECT: Guidance Memorandum No. 03-2010
Procedures for Administering Refunds of Water Permit Fees

TO: Regional Directors

FROM: Larry G. Lawson, Water Division Director
Valerie E. Thomson, Acting Director of Administration

DATE: April 14, 2003

REFERENCE: State Water Control Law, 62.1-44.15:6; 9-VAC 25-20-10 et. Seq.

COPIES: Deputy Regional Directors, Water Permit Mangers,
Martin Ferguson, Jon Van Soestbergen, Fred Cunningham, Amy Owens,
OWPP Staff, Judy Newcomb

Background:

This Guidance Memorandum sets forth uniform procedures for water permit application fee processing. This policy replaces the Fee Policy procedures for permit application fee collections dated June 6, 2001.

Electronic Copy:

The full text of this guidance is distributed electronically. The full text may be obtained at: http://vadeqnet/docs/default.asp?path=./main/water/Guidance_Memoranda for the appropriate year and guidance number.

You may navigate to this document by signing on to DEQNET then:

Click on the "Documents and Forms" tab.
Click on the link: "To view a list of files presently on DEQNet2 > click here".
Click on the "Water" folder.
Click on "Guidance Memoranda" folder.
Click on the appropriate year.
Click on the appropriate guidance document.

These electronic copies are in PDF format and may be read online, downloaded, distributed

to the staff or the public. The numbering convention is: GM, then a two digit number designating the year of preparation, followed by a hyphen and the document number.

Contact information:

Contact Martin Ferguson at (804) 698-4039 or e-mail at mgferguson@deq.state.va.us should you have questions about this Guidance Memorandum.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Procedures for Administering Refunds of Water Permit Fees

Statement of Procedures

A. Payment Procedures

1. General Information

For purposes of this Guidance Memorandum the term "application" includes Registration Statements for General Permits. Permit application fees must be submitted using the latest Permit Application Fee Form, which can be found on the web at http://www.deq.state.va.us/pdf/forms/water/feeform02.pdf . The applicant is to follow the directions on the form; i.e. the original check and fee form are to be sent to Receipts Control at the following address

Department of Environmental Quality
Receipts Control
P. O. Box 10150
Richmond, VA 23240

with a copy of the check and fee form sent to the Regional Office with the application.

Checks and money orders (payable to the Treasurer of Virginia/DEQ) and, in the case of other state agencies, IAT's (as a credit to DEQ) are acceptable forms of payment. No cash is to be accepted.

The Finance Office, upon receipt of a check and fee form, shall process the check, complete the deposit certificate and date information on the fee form, and send the form to the Regional Office.

Should the applicant use an old multi-colored form, the Regional Office may accept it so long as the current correct fee was submitted.

2. Procedures for Interagency accounts (IAT'S)

Regional/CO Permit Program Offices should notify state agencies from who permit application fees are due that an Interagency Transfer (IAT) may be used. State agencies will have the choice of initiating an IAT or paying by check. Should a state agency contact the Regional Office said agency should be directed to the CO Account Receivable Accounting Manager. When paying permit fees via IAT, state agencies must include DEQ's line of coding. See Attachment A for the appropriate coding for fees. A copy of the processed IAT and a copy of the fee form should be sent to DEQ Receipts Control. Payment is not considered

received until the IAT is posted to the DEQ CARS 401 weekly report, a copy of the processed IAT and a copy of the fee form are received by DEQ.

3. Checks received by Regional/CO permit program office

On occasion the applicant will deliver a payment directly to a Regional/CO Permit Office. When an original check for an application fee is received in a Regional/CO Permit Office, the check should be logged into the office's checks received log. These payments along with the ORIGINAL fee form should be sent daily to the CO Finance Office in order to expedite permit processing.

Regional Offices outside the Richmond area should send checks to Finance via a traceable delivery, courier, messenger service, such as Federal Express or by mail (using a blue security bag). Regional/CO Permit Program Offices in the Richmond area can use DEQ's internal delivery service to send checks to Finance.

Once checks have been received and deposited, Finance will indicate the deposit number and date on the receipts transmittal log which is filed in the Finance Office and return a copy of this log to the Regional/CO Permit Program Office. This will serve as a supporting document to the original log in the Regional/CO Permit Program Office that the checks were received in Finance and deposited.

B. Determining Fee Amounts

1. General Information

In order for the application to be considered complete the permit application fees are due on the day an application is submitted and must accompany the application fee form. The regulation 9 VAC 25-20-10 et Seq. stipulates the permit application fee required for each category of water permits issued. Within 14 days (for all permits except VWP which is 30 days) after receipt of a complete application, DEQ permit staff shall evaluate fee applicability. This applicability evaluation shall include: 1) whether the proposed activity requires coverage by a permit; 2) what specific permit coverage is required; and 3) whether the appropriate application fee has been received. If during the preparation of the draft permit it is determined that the status of the application has changed, for example from a minor to a major, the revised fee shall be required and must be submitted prior to the public notice of the permit.

For registration for general permit coverage, Regional/CO Permit Offices will advise registrants of the fee due. The fee is determined based on the application receipt date.

For VWP Permits, once the Joint Permit Application has been reviewed, program

staff will determine which VWP individual permit category the project will fall into or whether issuance of an individual permit will be waived. The applicant will be notified of the fee due by additional information request letter.

2. Deficiency letters

Each Regional/CO Permit Program Office will be responsible for generating deficiency letters when permit application fees are not paid in full or when a check is returned by the bank for insufficient funds. It is the CO Finance Office's responsibility to notify the program office when a check has been returned by the bank due to insufficient funds. The program office must notify the applicant of the check's return, the proper fee, and balance due by deficiency letter. The Regional Office shall provide a copy of the original fee form, with the DC#, to the applicant for use when submitting the additional fees. The applicant is to note the changes on the original fee form, then return the corrected fee form and the additional payment to DEQ Receipts Control, with copies to the program office. Copies of deficiency letters pertaining to permit fees should be sent to the Finance Office to identify incorrect payments received from applicants. Such deficiency letters should state that the application was deemed incomplete and processing will not resume until the proper fee is remitted. For permit reissuances, insufficient payment should be handled via Enforcement the same as with any other application deficiency. The deficiency letter should direct payments to DEQ Receipts Control.

3. Revenue Refunds

During the permit application review phase if there is a determination that the amount paid is greater than the correct application fee, then a refund memo must be initiated by the Regional/CO Permit Program Office. The following examples are the only cases where DEQ will process a full or partial refund of permit fees:

a) the general permit fee is determined to be less than the amount paid based on the remaining term of the permit (See [use web site, since this info changes fairly often] for general permit fee schedules);

b) an incorrect fee amount is determined during the permit application review, including duplicate payments, no application submitted with fee, a minor permit modification which requires no fee, or a General Permit which has no required fee;

c) application review indicates industrial facility is in a fee category other than what paid fee represents (e.g.: facility paid for a major, but rating sheet says that the source is a minor; or paid for a minor without standard limits but qualifies for minor with standard limits).

d) the application / registration is withdrawn within 90 days of receipt AND prior to being deemed administratively complete.

Refund requests may only be initiated for permit fees received within the past 90 days. Should the 90 day period be exceeded, the Region / Central Office may submit a refund request with documentation. Consideration for refund will be made on a case by case bases.

A refund of a permit fee must be initiated via the form included as Attachment B. This form must be completed and signed by a person in a position with delegated permit issuance and approval authority, and sent to the DEQ Accounts Receivable Accounting Manager. A copy of the fee form, which identifies the payment and date of deposit must be attached to the refund memo. Revenue refund requests will be sent to the Water Permit Fee Fund Manager, who will review the request and approve or deny the request.

Once the request has been received, reviewed, and approved by the Water Permit Fee Fund Manager, the Finance staff will process the revenue refund and maintain the supporting documentation from the Regional/CO Permit Program Office. Refund requests that are not approved will be sent back to the requesting office.

C. Reporting and Reconciling

1. Finance Office Procedures

The Finance Office will be responsible for recording all checks received in a receipts transmittal log and making deposits on a daily basis. The deposit number and date will be noted on each receipts transmittal log and this information will be used to enter the deposits into the Commonwealth Accounting and Reporting System (CARS).

The Finance staff will distribute a copy of the check and a copy of the permit application fee form to the appropriate Regional/CO Permit Program Offices daily. A copy of the application fee form will note the deposit number and date. The Finance staff will distribute copies of revenue refund transaction vouchers to the Regional/CO Permit Program Offices as refunds are processed**.**

2. Reconciliation Procedures

The Finance Office will be responsible for reconciling daily deposits to the weekly CARS reports. The Finance Office will be responsible for reconciling the receipts transmittal log maintained in the Finance Office to revenues reported in the monthly CARS reports. The Finance staff will also be responsible for

verifying accuracy of revenue refunds on the weekly and monthly CARS reports.

Each Regional/CO Permit Program Office must work with the Finance staff to reconcile fee receipts monthly. Each Regional/CO Permit Program Office must ensure that checks received directly by the Regional/CO Permit Program Office were received and deposited by the Finance Office. This can be accomplished by comparing the copies of the receipts transmittal log distributed by Finance that include deposit numbers and dates with the checks received log maintained in each individual office.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

ATTACHMENT A

To: Agencies and Institutions of the Commonwealth of Virginia

From: Valerie E. Thomson
Fiscal Director

Subject: Permit Fees Payable to the Department of Environmental Quality

Permit or Registration Fees which are due to the Department of Environmental Quality (DEQ) from state agencies may be paid by check or Interagency Transfers (IAT). A copy of the processed IAT water permit application fee form, the AST registration form, or Title V remittance invoice should be sent to DEQ Receipts Control, P.O. Box 10150, Richmond, VA. 23240. The appropriate lines of coding for DEQ fees are:

WATER PERMIT FEES:

Trans	Agency	Cost Code	Fund/Detail	Revenue Source
136	440	See below	0914	02401

Note: Please include 4 digit Permit fee form number in the CARS **Inv-No Field**
Please include Permit number in the CARS **DES Field**

AIR TITLE V PERMIT FEES:

Trans	Agency	Cost Code	Fund/Detail	Revenue Source
136	440	See below	0510	02100

Note: Please include 5 digit Registration/Account Number in the CARS **DES Field**

ABOVEGROUND STORAGE TANK REGISTRATION FEES:

Trans	Agency	Cost Code	Fund/Detail	Revenue Source	Project
136	440	611	0748	02708	70325

COST CODES

DEQ cost codes correspond with the DEQ regional or central office that will process the permit:

603-Central Office Water Permitting
701-South West Regional Office
704-West Central Regional Office
707-South Central Regional Office
710-Tidewater Regional Office
713-Piedmont Regional Office (includes Kilmarnock satellite office)
716-Northern Regional Office (includes Fredericksburg satellite office)
719-Valley Regional Office

ATTACHMENT B

SUBJECT: Permit Fee Refund Request
TO: DEQ Accounts Receivable Accounting Manager
FROM: Deputy Regional Director
DATE:

Name of source that made the original payment: _____

Permit Number of source that made the original request: _____

Permit Type: _____

Name and address of the source to which a refund should be made payable:

_____

_____

_____

Federal identification number of the source to whom the refund should be made: _____

DEQ deposit certificate (DC) number and date of the original payment:
DC Number: _____ DATE: _____

Amount of original payment: _____
Amount recommended to be refunded: _____

Date application or registration form received: _____

Basis for the proposed refund: [check at least one of the following and explain in detail why a refund is appropriate in an attached Memorandum with copies of the check and Fee Form from applicant. All requests that are incomplete will be disapproved and returned.]

____ the General permit fee is determined to be less than the amount paid.

____ an incorrect fee amount is determined during the 90 day application review.

____ a duplicate payment was made. Copies of all payments and fee forms must accompany the refund request.

____ no application submitted with fee.

____ the General permit has no required fee.

____ the application was withdrawn within 90 days of application receipt date.

____ other: explain in Memorandum

Attachments: Memorandum
Copy of Fee Form
Copy of Check

For Fee Fund Manager Only:

Approved: _____

Disapproved: _____

Date: _____

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Programs Coordination

SUBJECT: **GUIDANCE MEMORANDUM 02 – 2016**
Issuance of Virginia Water Protection Permits for Surface Water Impacts in the Potomac River

TO: Regional Directors

FROM: Larry G. Lawson, P.E.

DATE: August 7, 2002

COPIES: Regional VWPP Permit Managers, Martin Ferguson, Ellen Gilinsky, Kathy Frahm

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Summary:

The purpose of this guidance is to provide a framework for Virginia Water Protection permit requirements applicable to the Potomac River and to guide applicants and the Department of Environmental Quality in issuing VWP Permits for surface water impacts to the Potomac River. These impacts include regulated activities affecting wetlands and streams and water withdrawals. This guidance document shall take effect when the Attorney General certifies to the Department of Environmental Quality that the current litigation *Virginia v. Maryland*, No. 129, Orig., pending in the United States Supreme Court, has been concluded or resolved in a manner not inconsistent with the exercise of authority described in this guidance.

Electronic Copy:

The full text of this guidance is distributed electronically. The full text may be obtained at: http://vadeqnet/docs/default.asp?path=./main/water/Guidance_Memoranda for the appropriate year and guidance number.

You may navigate to this document by signing on to DEQNET then:

Click on the "Documents and Forms" tab.
Click on the link: "To view a list of files presently on DEQNet2 > click here".
Click on the "Water" folder.
Click on "Guidance Memoranda" folder.
Click on the appropriate year. Click on the appropriate guidance document. The numbering convention is: GM, then a two-digit number designating the year of preparation, followed by a hyphen and the document number.

These electronic copies are in PDF or DOC formats and may be read online, downloaded as "read-only" files, distributed to the staff, or may be distributed to the public.

Contact information:

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 or egilinsky@deq.state.va.us if you have any questions about this guidance.

Disclaimer:

This document provides procedural guidance to the permit staff. This document is guidance only. It does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the State Water Control Law and the implementation regulations on the basis of the site specific facts when permits are issued.

Issuance of Virginia Water Protection Permits
for Surface Water Impacts in the Potomac River

BACKGROUND

The legal authority for issuance of Virginia Water Protection Permits is contained in Section 62.1-44.5 of The Code of Virginia, "Prohibition of waste discharges or other quality alterations of state waters except as authorized by permit", as follows:

"A. Except in compliance with a certificate issued by the [State Water Control] Board, it shall be unlawful for any person to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances;

2. Excavate in a wetland;

3. Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses;

4. On and after October 1, 2001, conduct the following activities in a wetland:
   a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
   b. Filling or dumping;
   c. Permanent flooding or impounding; or
   d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

Further, Section 62.1-44.15:5 of the Code of Virginia, Virginia Water Protection Permit, states that:

"A. Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.

B. The Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses.

C. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses

shall be considered the highest priority uses.

The regulations promulgated by the State Water Control Board pursuant to the above sections of the Code of Virginia provide as follows with respect to the issuance of a Virginia Water Protection ("VWP") Permit, in 9VAC 25-210-50. "Prohibitions and requirements for VWP permits":

A. Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, excavate in wetlands, or on or after October 1, 2001, conduct the following activities in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
2. Filling or dumping;
3. Permanent flooding or impounding; or
4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

DEFINITIONS

The following pertinent definitions are taken from the Virginia Water Protection Permit Regulation (9 VAC 25-210-10):

"Adjacent" means bordering, contiguous or neighboring; wetlands separated from other surface waters by man-made dikes or barriers, natural river berms, sand dunes and the like are adjacent wetlands.

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to: the protection of fish and wildlife habitat; maintenance of waste assimilation; recreation; navigation; and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to: domestic (including public water supply); agricultural; electric power generation; and commercial and industrial uses.

"Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of any pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

"Draining" means human-induced activities such as ditching, excavation, installation of tile drains, hydrologic modification by surface water runoff diversion, pumping water from wells, or similar activities such that the activities have the effect of artificially dewatering the wetland or altering its hydroperiod.

"Dredged material" means material that is excavated or dredged from surface waters.

"Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

"Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil or rock.

"Fill" means replacing portions of surface water with upland, or changing the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.

"Fill material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose.

"Permanent flooding or impounding" means an increase in the duration or depth of standing water on a land surface, other than that resulting from extended-detention basins and enhanced extended-detention basins designed, constructed, and maintained to function in accordance with Virginia Department of Conservation and Recreation (DCR) standards for such facilities (Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3) or local standards that, at a minimum, meet the DCR standards.

"Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution.

"Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter.

"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions.

State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

“Surface water” means all state waters that are not ground water as defined in Section 62.1-255 of the Code of Virginia.

"VWP permit" means an individual or general permit issued by the board under §62.1-44.15:5 of the Code of Virginia that authorizes activities otherwise unlawful under §62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's §401 certification.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

In addition, the following definitions are applicable to this guidance:

"Originating in Virginia" means regulated impacts from projects that are connected to or begin on Virginia's land or shoreline; such impacts include water withdrawals from facilities located in Virginia, pipelines emanating from Virginia facilities, excavation or other bottomland disturbances related to the construction or expansion of facilities with Virginia addresses.

COVERAGE

The definition of “state waters” includes waters “partially within” or “bordering the Commonwealth”. Accordingly, activities originating in Virginia that impact the Potomac River and that are covered by VWPP program (see 9 VAC 25-210-50) require a VWP permit. Therefore, Virginia users who seek to withdraw water from the Potomac River or who seek to construct an improvement appurtenant to the Virginia shoreline will be required to obtain a VWP permit.

VWP Permits will be processed according to the VWP regulation and the procedures outlined in the VWP Permit Manual (Guidance Memorandum 02-2005, May 1, 2002).

For water withdrawal permits, the statutory considerations applicable to the issuance of a VWP Permit include protecting “instream beneficial uses.” [Section 62.1-44.15:5(B) of the Code of Virginia]. Those beneficial uses are flexibly described as follows:

> C. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia’s waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses shall be considered the highest priority uses.

The statute also calls for consultation with other agencies prior to issuance of a VWP permit, in Section 62.1-44.15:5 F of the Code of Virginia:

"F. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources Commission, the Department of Health, the Department of Agriculture

and Consumer Services and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within forty-five days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit." (Emphasis added).

For VWP Permits sought by Virginia users of the Potomac River, the Maryland Department of Environment shall be furnished copies of the applications and as an "interested and affected agency" shall be consulted in the same manner as are Virginia agencies under subsection (F) above.

For users seeking to withdraw water through a pipe or intake extending from the Virginia side of the Potomac River, any approved VWP permit shall include such provisions as are necessary to comply with, and to effect the purposes of, the Potomac River Low Flow Allocation Agreement, dated January 11, 1978, by and among the United States of America, the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitary Commission and the Fairfax County Water Authority.

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 with any questions about the application of this guidance.

MEMORANDUM

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Water Division

Subject: GUIDANCE MEMORANDUM 02-2012
Determination of Service Areas for Compensatory Mitigation Banks

To: Regional Directors

From: Larry G. Lawson, P.E., Director

Date: July 12, 2002

Copies: Regional Permit Managers, Regional Compliance and Enforcement Managers, Regional VWPP Supervisors, Mary Jo Leugers, Martin Ferguson, Ellen Gilinsky

Summary:

When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for unavoidable impacts to surface waters, including wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from a wetlands mitigation bank that has been approved and is operating in accordance with applicable federal and state guidance, laws or regulations. This guidance clarifies how DEQ reviews and determines the service areas for proposed compensatory mitigation banks pursuant to statutory requirements and the Virginia Water Protection Permit (VWPP) regulation. In addition, the guidance addresses how DEQ reviews a compensatory mitigation proposal for permitted wetland impacts to determine if use of a mitigation bank is appropriate.

Electronic Copy:

The full text of this guidance is distributed electronically. The full text may be obtained at: http://vadeqnet/docs/default.asp?path=./main/water/Guidance_Memoranda for the appropriate year and guidance number.

You may navigate to this document by signing on to DEQNET then:

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Click on the "Water" folder.
Click on "Guidance Memoranda" folder.
Click on the appropriate year.
Click on the appropriate guidance document.

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Contact information:

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, It does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

DETERMINATION OF SERVICE AREA FOR COMPENSATORY MITIGATION BANKS

PURPOSE

The purpose of this guidance is: (1) to clarify how DEQ reviews the service areas for proposed compensatory mitigation banks pursuant to statutory requirements and the Virginia Water Protection Permit (VWPP) regulation; and (2) to clarify how particular mitigation banks are determined to satisfactorily compensate for permitted wetland impacts.

BACKGROUND

The *National Wetland Mitigation Banking Study* (U.S. Army Corps of Engineers, IWR Report 94-WMB-6, 1994) defines wetland mitigation banking as "a system in which the restoration, creation, enhancement, or preservation of wetlands is recognized by a regulatory agency as generating credits that may be used to compensate for multiple wetland impacts occurring generally within the same watershed as the banked wetlands." The national study further states that "the wisest approach to *ad hoc* approvals of banks is a hydrologically based or habitat based approach to the service area."

In recent years, wetland and stream mitigation banking has become an increasingly popular enterprise, in Virginia and in other states, because banks often provide greater ecological benefits than smaller, on-site compensatory mitigation and there are potential economies of scale for development of the mitigation bank. While not intended to completely replace on-site compensatory wetland and stream mitigation, mitigation banking is an alternative approach to compensate for the loss of wetland and stream acreage and function that in many circumstances may be more practicable and ecologically preferable to other alternative means of compensation.

Both Federal regulations and guidance (*Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks*; Federal Register, Vol. 60, No. 228, pages 58605-58614) and Virginia law (Section 62.1-44.15:5 Code of Virginia) outline criteria for the determination of the geographical service areas for wetland mitigation banks. Of relevance to the VWPP program are the requirements of the Code of Virginia, Section 62.1-44.15:5 E, as follows:

> *When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetlands mitigation bank, including any banks owned by the permit applicant, that has been approved and is operating in accordance with applicable federal and state guidance, laws or regulations for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as the impacted site, or it meets all the conditions found in*

clauses (i) through (iv) and either clause (v) or (vi) of this subsection; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. When the bank is not located in the same cataloging unit or adjacent cataloging unit within the same river watershed as the impacted site, the purchase or use of credits shall not be allowed unless the applicant demonstrates to the satisfaction of the Department of Environmental Quality that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project or as the result of a locality project for a locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river watershed mitigation alternative; (iii) the impacts are less than one acre in a single and complete project within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (vi) impacts within U.S.G.S. cataloging units 02080108, 02080208, and 03010205, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), are mitigated in-kind within those hydrologic cataloging units, as close as possible to the impacted site. After July 1, 2002, the provisions of clause (vi) shall apply only to impacts within subdivisions of the listed cataloging units where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date. The Department of Environmental Quality is authorized to serve as a signatory to agreements governing the operation of wetlands mitigation banks. The Commonwealth, its officials, agencies, and employees shall not be liable for any action taken under any agreement developed pursuant to such authority. State agencies are authorized to purchase credits from wetland mitigation banks.

DETERMINATION OF SERVICE AREAS

Section 62.1-44.15:5D of the Code of Virginia defines the maximum allowable service area as being the same or adjacent hydrologic unit code (HUC) within the same river watershed, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980). This limitation on the potential service area also follows the intent of a watershed approach outlined in the Federal guidance (Federal Register, Vol. 60, No. 228, pages 58605-58614). DEQ further refines the service area for each proposed wetland mitigation bank based on similarity of habitat, physiographic province, and ecoregion. These criteria should also logically apply to mitigation banks for streams. As with most aspects of mitigation banks, DEQ works closely with the entire Mitigation Banking Review Team (MBRT), with the DEQ, Corps, U.S. Fish and Wildlife Service, EPA, and the Department of Game & Inland Fisheries as the primary team members, to determine a service area that is mutually acceptable and conforms to each agency's regulations and guidance. The service area of any given mitigation bank may coincide with the maximum allowable service area defined by Virginia statute, or the service area may be more restrictive than the maximum allowable service area based on the above factors. If a proposed mitigation bank covers more

than one river watershed, then the service area of the bank can span both watersheds; however projects can only use the bank within the parameters of the state statute listed above.

The statute provides for an exception to the service area limitations for Virginia Department of Transportation linear projects and for local government projects for localities spanning multiple watersheds, provided that: (1) the projects impact less than 1 acre of wetlands; (2) there is no practicable same river watershed mitigation alternative; (3) there is no significant adverse impact to water quality or fish and wildlife resources within the watershed of the project; and (4) either impacts within the Chesapeake Bay watershed are mitigated within that watershed as close as possible to the impact site or, as stated in clause (vi), impacts within HUCs 02080108, 02080208, and 03010205 are mitigated within those same HUCs as close as possible to the impact site.

The statute notes that after July 1, 2002, the provisions of clause (vi) shall apply only to impacts within subdivisions of the listed cataloging units where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date. Accordingly, DEQ was tasked with conducting a study on hydrologic interaction in cataloging units 02080108, 02080208 and 03010205, all of which are in the Tidewater area. The DEQ contracted with the U.S.G.S. to evaluate the flow of surface waters in these areas. The U.S.G.S. conducted fieldwork at key flow interaction points and evaluated existing data and reports on flow between these HUCs. Based upon this work, the U.S.G.S. and DEQ determined that the two river watersheds encompassed by these HUCs (James River and Chowan River basins) have a high potential to, and in many instances do, interact due to tidal influences, wind and other weather conditions, and alterations in direction of flow as a result of U.S. Army Corps of Engineers' manipulations of the Dismal Swamp Canal. These interactions are, however, limited to the areas located south of the James River. Accordingly, after July 1, 2002, for Virginia Department of Transportation linear projects and for local government projects for localities spanning multiple watersheds only, the use of a wetland mitigation bank within the same or adjacent HUC, regardless of river-watershed, will be allowed for impacts of less than one acre located within those portions of HUCs 02080108, 02080208 and 03010205 that are south of the James River.

APPROVAL OF BANK USE FOR COMPENSATORY MITIGATION FOR UNAVOIDABLE PROJECT IMPACTS

The first step in reviewing compensatory mitigation is to determine that the applicant has avoided and minimized surface water impacts to the extent practicable, pursuant to 9 VAC 25-210-155A. Next, the applicant must evaluate the type of compensatory mitigation appropriate for the unavoidable impacts. The appropriate compensatory mitigation option for project impacts is evaluated on a case-by-case basis, in terms of replacement of wetland or stream acreage and function (see 9 VAC 25-210-80 B 4 g and 9 VAC 25-210-115). An alternatives analysis is required to justify that off-site or out-of-kind compensatory mitigation is more practicable and ecologically preferable than on-site compensation. Off-site mitigation can include: (1) creation or restoration of wetlands, potentially accompanied by wetland preservation, by the project proponent at a site different than the impact site; (2) purchase or use of mitigation bank credits; or (3) contribution to an in-lieu fee fund. The alternatives analysis must compare the ability of each compensatory mitigation option to replace lost acreage and function, and should include a comparison of criteria such as: water quality benefits, acreage, distance from impacts, hydrology, functions and values, vegetation and soils, constructibility, timing, property acquisition, and cost.

According to 9 VAC 25-210-115 F, the use of a mitigation bank is deemed appropriate for compensating project impacts if: (1) the bank meets the criteria and conditions found in Section 62.1-44.15.5E of the Code of Virginia; (2) the bank is ecologically preferable to practicable on-site and off-site individual compensatory mitigation options; (3) the banking instrument was approved by a process that involved public review and comment in accordance with federal guidelines (after July 1, 1996); and (4) the applicant provides verification to DEQ of purchase of the required amount of credits. Once it is determined that a mitigation bank is an appropriate alternative, DEQ must then determine if the proposed project is located within same or adjacent HUC within the same river watershed as the mitigation bank and that the project is within the approved service area for the mitigation bank proposed for use. The purchase of credits from a bank meeting these criteria can then be allowed as a condition of the VWP permit.

The only exceptions to the statutorily defined service area parameters are for VDOT and locality projects that are linear in nature and impact less than one acre of wetlands (Section 62.1-44.15:5E). Based upon the U.S.G.S. summary of existing data to date, it appears that there is some degree of intermixing of surface-water flow between HUCs 03010205 (Dismal Swamp Basin), 02080108 (lower Chesapeake Bay/Hampton Roads), and 02080208 (Nansemond River/Elizabeth River Basin). Given the potential existence for overlapping watersheds in the Tidewater area, those portions of HUCs 02080108 and 02080208 south of the James River will be considered to overlap with 03010205 for purposes of mitigating VDOT and locality projects of less than one acre, as discussed above. The purchase of credits from a bank meeting these criteria can then be allowed as a condition of the VWP permit.

These electronic copies are in PDF format and may be read online, downloaded, distributed to the staff or the public. The numbering convention is: GM, then a two digit number designating the year of preparation, followed by a hyphen and the document number.

Contact information:

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, It does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

COMMONWEALTH of VIRGINIA

James S. Gilmore, III
Governor

John Paul Woodley, Jr.
Secretary of Natural Resources

DEPARTMENT OF ENVIRONMENTAL QUALITY
Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 10009, Richmond, Virginia 23240
Fax (804) 698-4500 TDD (804) 698-4021
http://www.deq.state.va.us

Dennis H. Treacy
Director

(804) 698-4000
1-800-592-5482

MEMORANDUM

Division of Water Program Coordination
Office of Water Permit Programs

SUBJECT: GUIDANCE MEMORANDUM 01-2022
Interim Guidance on Issuance of Virginia Water Protection (VWP) Permits for Virginia Department of Transportation Projects

TO: VWPP VDOT Permit Writers

FROM: Larry G. Lawson, P.E.

DATE: July 26, 2001

COPIES: Martin Ferguson, Ellen Gilinsky

This guidance memorandum provides an overview of the new protocols to follow for issuance of VWP permits for Virginia Department of Transportation (VDOT) projects. On August 1, 2001 the revised VWPP regulation (9VAC 25-210 et seq.) and Transportation General Permit (9VAC 25-680 et seq.) go into effect for VDOT projects only. While much of the way we process permits remains the same, there are different timelines and some revised procedures that will need to be implemented. The VWPP Program is developing a detailed permit manual to address the issuance of individual and general permits for all types of project. This manual will be complete in time for the October 1, 2001 implementation date for the remainder of the program. Until that time, this memorandum will serve as interim guidance on permit issuance for VDOT projects.

The attached flow chart provides a decision matrix for general permit processing, beginning when the application is received at the Interagency Coordination Meeting (IACM). The following provides more detailed information on the processing of both individual and general permits for VDOT linear projects under the new regulations.

VWP Individual Permit for VDOT Linear Transportation Projects

This section summarizes the permitting process with associated timeframes for issuing a VWP Individual Permit for a VDOT linear transportation project in accordance with 9 VAC 25-210-10 et seq. The maximum term for a VWP Individual Permit is fifteen years.

Authorization Process

VDOT will submit a completed Joint Permit Application (application) at the monthly Interagency Coordination Meeting (IACM). The date of the IACM is considered the date of application receipt. The permit writer should adhere to the following issuance process for each project:

- Review the application to determine if the project qualifies for a VWP Individual Permit.
- Initiate CEDS data entry.
- Determine if the application is complete within 15 days of date of receipt.
- If incomplete, prepare an Additional Information Request Letter summarizing the required information.
- If complete, prepare an Application Complete Letter or send an e-mail to the permittee, with copies to the district and central office permit coordinators stating that the application is complete.
- Determine if the appropriate fee has been debited through the interagency transfer process outlined in Guidance Memo 01-2021.
- Submit Request for Agency Comments letters to the Department of Health, Department of Game and Inland Fisheries, Department of Conservation and Recreation, and Virginia Marine Resources Commission. These agencies have 45 days to respond with comments. Note that any significant comments received should be addressed in the Special Conditions section of the permit.
- Coordinate with the appropriate federal agencies for projects involving significant impacts, if there are specific points relating to an agency which must be addressed, or if the project is controversial and will warrant significant public comment.
- Notify riparian landowners located adjacent to the impact area and within one-half mile downstream of each distinct impact area.
- Conduct a site visit of the impact and compensation sites.
- Prepare the Draft Permit Package (Fact Sheet, Permit Cover Page, Part I Special Conditions, Part II General Conditions, Public Notice and Verification Form).
- Submit Draft Permit Package for internal DEQ review by the VWPP Program Manager, and address any comments.
- Submit Draft Permit Package to applicant for review and publication of public notice. Also submit the public notice to Priscilla Royal for posting.
- Determine if a Public Hearing is warranted based on public comments.
- Conduct a Public Hearing (as appropriate).

- Prepare the Final Permit Package (Fact Sheet, Permit Cover Page, Part I Special Conditions, Part II General Conditions).
- Submit Final Permit Package for internal DEQ review by the VWPP Program Manager and Assistant Water Division Director.
- Issue VWP Individual Permit to permittee.
- Complete all CEDS information.
- Review all required plans and monitoring reports and prepare comments for permittee.

Timeframes for VWP Individual Permits

The VWP Individual Permit must be issued, issued with conditions, denied, or a decision made to conduct a public hearing within 120-calendar days of receipt of a complete application. The following section provides details concerning the timeframes associated with the VWP Individual Permit.

The permit writer must review the application for completeness within 15 calendar days of the date of the IACM. The permit writer must either accept the application as complete or request additional information by the 15th day. If the application is determined to be incomplete, the permit writer must prepare and submit a request letter within the 15-calendar day period summarizing the required additional information. At this point, the processing clock is stopped until the application is considered complete or the applicant submits additional information. Note that if the additional information request letter is not written within the 15-calendar day period, the application is legally considered complete and the 120-calendar day processing time has started. Once the 15 day period has passed, the permit writer can request additional information; however, the 120-calendar day processing time has officially started.

Once the application is determined to be complete, the permit writer has 120 calendar days to complete the review and decide to either issue the permit, issue the permit with conditions, deny the permit, or decide to conduct a public hearing. The public hearing must be scheduled within 60 calendar days of the decision to conduct the proceeding, and a final decision (e.g., to issue, withdraw, or deny) must be made within 90 calendar days after the public hearing date.

If the respective action is not initiated or completed by the 120th day, the applicant does not automatically receive authority to conduct the proposed activity. The permit writer should contact his or her supervisor to discuss why the timeframe was missed and the appropriate course of action.

Although the permit fee is officially required for a complete application, the permit writer is to start the 120-calendar day processing clock once all requested information has been received, with the exception of the permit fee. However, the Draft Permit Package can not be submitted for applicant review until the fee has been received by DEQ accounting.

VWP General Permit No. WP 3

This section summarizes the permitting process with associated timeframes for a VWP General Permit No. WP3, under 9 VAC 25-680-10 et seq. This VWP General Permit governs impacts related to the construction and maintenance of VDOT or other linear transportation projects. VWP General Permit No. WP3 authorizes impacts of up to two acres of nontidal surface water (including wetlands), including up to 500 linear feet of perennial stream channel and up to 1,500 linear feet of nonperennial stream channel. The VWP General Permit for VDOT linear transportation projects is effective on August 1, 2001 and expires on August 1, 2006. The authorization term for VDOT linear transportation projects is five years.

The attached Fact Sheet provides a detailed summary of VWP General Permit No. WP3, including the limitations for authorized activities, stipulations and exceptions for coverage, compensation requirements, denial of coverage, notification requirements, term limitations, and purpose and justification of the permit conditions.

Authorization Process
VDOT will submit a completed Registration Statement or the VDOT Joint Permit Application (both referred to as "application") at the monthly IACM. The date of the IACM is the date of application receipt. The permit writer should adhere to the following authorization process for each project.

- Review the application to determine if the project qualifies for the VWP General Permit No. 3.
- Initiate CEDS data entry.
- Determine if the application is complete.
- If incomplete, prepare an Additional Information Request Letter summarizing the required information.
- If complete, prepare an Application Complete Letter or send an e-mail to the permittee, with copies to the district and central office permit coordinators stating that the application is complete.
- Determine if the appropriate fee ($200.00) has been debited through the interagency transfer process outlined in Guidance Memo 01-2021
- Contact any state or federal agency for projects involving significant impacts, if there are specific points relating to an agency which must be addressed, or if the project is controversial and will warrant significant public comment.
- Conduct a site visit for projects impacting more than a tenth of an acre and requiring a GP (i.e. not covered under a NWP for which DEQ has issued certification).
- Determine if the VWP General Permit authorization will be approved or denied.
- Prepare Memorandum, Transmittal Letter, and GP Authorization.
- Submit above documents for internal DEQ review by the VWPP Program Manager.
- Issue finalized documents to permittee.
- Complete all CEDS information.

- Review Finalized Compensation Plan within specified timeframes (see flow chart). prepare comments for permittee.

Timeframes for VWP General Permit No. WP3
The VWP General Permit authorization must be approved, approved with conditions, or denied within 45-calendar days of receipt of a complete application. The following section provides details concerning the timeframes associated with the VWP General Permit No. 3 authorization process. The attached flowchart depicts several major milestones and associated timeframes.

Although not a regulatory deadline under this General Permit, the permit writer should review the application and either accept the application as complete or request additional information within 15 calendar days from the date of the IACM. If the application is determined to be incomplete, the permit writer should prepare and submit a request letter within the 15-calendar day period summarizing the required additional information. The permit writer should also try to review any additional information provided by the applicant in response to the request letter within 15-calendar days. The 45-day processing clock does not start until the application is considered complete. Note that although the permit fee is officially required for a complete application, the permit writer should start the 45-calendar day processing clock once all requested information has been received, with the exception of the permit fee.

If the full 45-calendar days have passed without the permit writer officially preparing and submitting a VWP General Permit authorization or denying the authorization, the authorization is issued by default. However, to ensure that the permit conditions are understood and followed by the applicant, and for the permit file, the permit writer should still submit a hard copy of the authorization to the permittee.

Once the authorization has been issued, the permittee must submit various plans and reports in accordance with the Part II Mitigation, Monitoring, and Reporting Conditions. The permit writer has 30-calendar days to review and provide written comments on the Final Compensation Plan. If the permit writer does not provide written comments within this 30-day time period, the plan is officially approved as written.

Permit Changes

VWP Individual Permit
A VWP Individual Permit may be modified to substantially change the permit authorization or condition (Major Modification) or a specific detail (Minor Modification). An Extension may be required to extend the term of the coverage when no other permit condition is altered. A VWP Individual Permit may be Reissued when a permit expires but the authorized activity does not. Termination of a permit may be required to take away the authorization to continue an activity, either because of non-compliance or because the activity has been completed prior to the expiration date. A Revocation and Reissuance is a combination of modifying the permit to change a significant condition (i.e., Major Modification) and reissuing the permit with a new permit term.

VWP General Permit No. WP3

Authorization under a VWP General Permit may be modified up to the permit impact cap if the permittee determines that additional wetland and stream impacts are necessary, provided that the cumulative increase in acreage of wetland impacts is not greater than 1/4 acre and the cumulative increase in stream impacts is not greater than 50 linear feet, and provided that the additional impacts are fully mitigated. The authorization may be reopened to revoke and reissue when the circumstances on which the authorization was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial changes. The may be terminated for the following reasons: noncompliance of any condition; the permittee's failure in the application or during the VWP General Permit authorization issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time; the permittee's violation of a special or judicial order; or, a determination by the board that the permitted activity endangers human health or the environment and can be regulated to acceptable levels by VWP General Permit authorization modification or termination. An extension of the authorization may be required to assure that the compensatory mitigation work has been successful. The request for extension (or renewal) must be made by the permittee at least 60 days prior to the expiration date of the authorization.

Compliance and Enforcement

The inspector is responsible for monitoring compliance with permits and identifying areas of potential noncompliance with permit conditions. Consistent with the procedures set forth in DEQ's Enforcement Manual, the inspector will evaluate alleged violations and initiate appropriate compliance/enforcement actions based on the nature and severity of the alleged violation. Alleged violations which warrant the issuance of an enforceable order or the assessment of civil penalties, according to the criteria in the Enforcement Manual, will be referred to the appropriate Regional Compliance and Enforcement Manager for enforcement action.

Note that for VDOT permits, the VWP permit writer will also serve as the VWP permit inspector.

This guidance memorandum presents the general procedures to use when issuing VDOT permits under this new program. Any specific questions should be directed to your supervisor, who will work with you to provide the appropriate response given our statutory and regulatory authorities. Once the VWPP Permit Manual is finalized, it will supercede the procedures provided in this memorandum.

DISCLAIMER

This document provides procedural guidance to the permit staff. This document is guidance only. It does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the State Water Control Law and the implementation regulations on the basis of the site-specific facts when permits are issued.

COMMONWEALTH OF VIRGINIA

Department of Environmental Quality

Office of Water Permit Support

629 East Main Street Richmond, Virginia 23219

MEMORANDUM

Subject: Guidance No. 01-2012 - Siting of Storm Water BMPs in Surface Waters and the Application of Temperature Standard to Impoundments

To: Regional Directors

From: Larry G. Lawson

Date: April 18, 2001

Copies: Regional Permit Managers, Regional Water Permit Managers, Regional Compliance and Enforcement Managers, Martin Ferguson, Alan Pollack, Jean Gregory, Richard Ayers, Dale Phillips, Ellen Galinsky, Joe Hassell, George Cosby

Background:

A variety of impoundments are being proposed in the state to provide for a variety of uses. The impoundments range from large multi-use structures to small sediment trapping basins. The uses they provide may include: flood control, recreation, water supply, power generation, flow augmentation, silt/sediment control, irrigation, storm water BMPs and livestock water supply. Many of these impoundments require a permit from the Board for their construction, operation and maintenance.

Impoundments have the potential to significantly alter the aquatic environment in the inundated area and may alter the environment downstream from the impoundment. It has recently come to our attention that there is inconsistency in the way we permit such facilities and the way water quality standards are interpreted and applied in our permits for these facilities.

The purpose of this guidance is to recommend a consistent approach to permitting these facilities and a consistent application of the temperature standards to impoundments in permanent or intermittent stream channels.

Please note that this guidance updates and replaces OWRM guidance #95-001

Definitions:

For clarity and in order to avoid confusion, selected terms have the following meanings as used hereafter in this document:

Permanent (Perennial) Stream: a waterway that contains water at all times during a typical year and that has, or could have, a well established aquatic community.

Intermittent Stream: a waterway that contains flowing water at times during a typical year when groundwater provides water for the stream flow, but does not contain water at all times, particularly during dry periods. These streams are likely to have an active aquatic community for at least part of the average year.

Ephemeral Stream: a waterway such as a drainage way, ditch, hollow or swale that contains water only during or for a short duration after precipitation events in a typical year.

Impoundment: a structure, regardless of its size or intended use, to gather and store surface water that captures the flow of, and is constructed in the channel of, a permanent or intermittent stream.

Pond: a structure to gather and store surface water that may or may not be constructed to include the channel of ephemeral streams. A pond does not capture the flow of and does not include the channel of a permanent or intermittent stream.

Natural Temperature: that temperature of a body of water due solely to natural conditions without the influence of any point source discharge.

Temperature Standards:

The water quality standards establish four criteria for temperature in state waters:

- 9 VAC 25-260-50 establishes a maximum temperature that may not be exceeded.
- 9 VAC 25-260-60 establishes a limitation on the rise above the natural temperature of a water body.
- 9 VAC 25-260-70 establishes a limitation on the hourly rate of temperature change.
- 9 VAC 25-260-80 establishes restrictions on point source discharges to impoundments.

9 VAC 25-260-50, applies at stream flows equal to or greater than the 7Q10. It does not apply during lower flows. There is no low stream flow associated with 9 VAC 25-260-60, 9 VAC 25-260-70 and 9 VAC 25-260-80.

9 VAC 25-260-60 also provides the definition for "natural temperature" as that temperature of a body of water due solely to natural conditions without the influence of any point source discharge. Note that this is an important definition because it does not necessarily exclude anthropomorphic impacts, other than point source discharges. For example, a rise in temperature due to the discharge of heated cooling water is clearly not a "natural condition" according to this definition. However, an increased temperature that is the result of increased sunlight input (due to removal of forest cover) is not necessarily excluded from, and could be considered as, a natural condition.

Interpretation of the standards:

9 VAC 25-260-50, 9 VAC 25-260-60 and 9 VAC 25-260-70 are discussed in this section. 9 VAC 25-260-80 is discussed later in this document.

When an impoundment or pond is constructed, it is likely that the temperature of the stored waters will be higher than the temperature of the feeder streams. This is true even when there is no point source discharge of thermal energy to the impoundment. The temperature that will result is due to conditions that may include, increased sunlight input, decreased shading, decreased turbulence, thermal stratification, etc. all of which are the "natural" result of impounding a stream or creating a pond. Thus, it can be argued that the resulting temperature within an impoundment or pond and for some distance downstream, regardless of its final value, does not violate the requirements of 9VAC 25-260-50, 9VAC 25-260-60 or 9VAC 25-260-70 in the absence of a point source discharge of thermal pollution.

Implementation - Impoundments:

DEQ is not supportive of the construction of impoundments in the channel of permanent or intermittent streams. Specifically, this also applies to sedimentation basins and other storm water BMPs. DEQ believes and recommends that such projects should be permitted only in situations where the following criteria have been met:

- An alternative analysis has been performed and no practicable alternative exists.
- The alternative analysis has demonstrated that the adverse environmental impacts caused by the impoundment are less damaging than the harm caused by uncontrolled storm water or the benefits of the impoundment are in the public interest and such interests exceed the adverse environmental impacts expected from its construction and maintenance.
- The alternative analysis has demonstrated that the permittee will take all reasonable steps to: (1) avoid adverse environmental impacts, (2) minimize the adverse impact where avoidance is impractical and (3) provide mitigation of the adverse impact on an in kind basis where applicable.
- A demonstration that the siting of the facility, its operation and maintenance will not adversely impact the instream beneficial uses or result in substantive degradation of water quality.
- A comprehensive operation and maintenance plan has been developed.

When no practicable alternative exists, permits for the construction of impoundments may be issued. However, since it is unreasonable to issue a permit authorizing a project and simultaneously to impose permit conditions that are known to be very unlikely be met, the recommendations for the implementation of the temperature standards relative to impoundments is based on the following concept:

> Temperature along with all other applicable parameters are valid concerns and should be addressed when the issuance of a permit to allow the construction of an impoundment is being considered. Appropriate restrictions and conditions may be placed in a permit that are intended to avoid and/or minimize adverse impacts but they must be reasonable, practicable and under the control of the permittee.
>
> However, once the decision is made to allow the construction then it must be realized that the decision has also been concurrently made (whether intentional or unintentional) to accept whatever conditions that result from the permitted activity, providing they are the natural consequence of impounding water and not due to point source discharges of pollutants (including thermal discharges).

This basically means that no temperature limitations that would apply to the impounded water should be placed in a permit that authorizes or allows the construction of an impoundment or pond. However, the potential for increased temperature in both the impoundment or pond and the downstream area is a valid concern and should be considered in the decision regarding the **issuance** of a permit to authorize or allow construction. Practicable requirements to avoid or minimize such impacts may be placed in the permit.

Implementation - Ponds:

In general, DEQ approves of and is supportive of the construction of ponds in ephemeral waterways that serve as storm water BMPs and, in general, ephemeral waterways are considered suitable sites for the placement of ponds..

The temperature that occurs in a pond is generally of little or no concern due to the small volumes that are usual in such structures, the widely fluctuating water levels and the lack of direct and/or continuous hydraulic connection to permanent or intermittent streams.

Temperature limitations should not be included in permits that authorize or allow the construction of ponds. However, considerations similar to those for impoundments, as discussed above, would apply regarding the decision for issuance of a permit to construct a pond, including possible downstream impacts.

Implementation of 9 VAC 25-260-80:

This standard specifically discusses thermal restrictions on point sources that discharge to impoundments. This will not impact a VWP permit that is issued to allow the construction of an impoundment and, as discussed above, temperature limitations are not appropriate in that permit. However, this standard will require that the thermal condition of the impoundment be analyzed and documented in the event that a VPDES permit is issued that allows a thermal discharge to an impoundment. Temperature limits placed in a VPDES permit that authorizes a point source discharge to an impoundment should be based on the temperature of the impoundment after construction and after it has attained thermal stability. VPDES permit limits to control the temperature in an impoundment or pond should not be based on the temperature of the feeder streams.

Note that cooling ponds that are constructed specifically for cooling an effluent prior to discharge are considered as part of the treatment facility and are not subject to the water quality standards. Such cooling basins/ponds/impoundments should not be allowed to be constructed in the channel of any waterway unless specifically authorized by a VPDES permit and, perhaps, a 316(a) variance as approved by the Board .

General guidance for siting storm water management BMPs in surface waters including wetlands:

A watershed approach should be encouraged in lieu of isolated management efforts, particularly when being applied to urban watersheds. A rule of thumb for identifying an urban watershed or stream is one that contains 20% or greater impervious area. A watershed approach has the following benefits:

- More effective flood control for the entire stream corridor.
- Opportunities are greater for the installation of water quality controls in watersheds developed with no controls.
- Protection of undeveloped stream and wetland resources are enhanced.
- Restoration, retrofit and mitigation opportunities are greater.
- It results in fewer facilities to operate and maintain.

Exceptions:

There are several situations where the conditions that will result from the construction of an impoundment or pond may result in unacceptable thermal or environmental impacts on the aquatic environment and such projects should not be issued a permit. These include impoundments (and may include ponds) that are proposed in or that will adversely impact downstream:

- Class V put and take trout streams.
- Class VI natural trout streams.
- Any waters containing rare or endangered species.
- All waters designated by the board as antidegradation tier III waters.

In addition to these exceptions, care should be taken to assess the cumulative impact of multiple impoundments or ponds within a watershed. While the conditions that result from each individual impoundment may be found acceptable the cumulative impact may not be.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, It does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

If you have any questions regarding this guidance please feel free to contact Dale Phillips or Ellen Galinsky.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

James S. Gilmore, III
Governor

John Paul Woodley, Jr.
Secretary of Natural Resources

Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 10009, Richmond, Virginia 23240
Fax (804) 698-4500 TDD (804) 698-4021
http://www.deq.state.va.us

Dennis H. Treacy
Director

(804) 698-4000
1-800-592-5482

MEMORANDUM

Division of Water Program Coordination
Office of Water Permit Programs

SUBJECT: GUIDANCE MEMORANDUM 00 - 2003
Wetland Compensation Ratios

TO: Regional Directors

FROM: Larry G. Lawson, P.E.

DATE: February 1, 2000

COPIES: Regional Permit Managers, Regional Compliance and Enforcement Managers, VWPP Supervisors, Mary Jo Leugers, Martin Ferguson, Richard Ayers, Joe Hassell, Ellen Gilinsky, Tracey Harmon

On October 30, 1997 Governor George Allen signed The Chesapeake Executive Council's Directive No. 97-2 that directed Virginia "to develop strategies to achieve the protection and preservation of the Bay's wetland resources". In his Plan for Action on Virginia's Environment in the 21st Century, Governor James Gilmore made a commitment to establish a wetland program with the objective of "reversing Virginia's long-term loss of wetlands." On the subject of wetland compensation ratios, Secretary of Natural Resource John Paul Woodley's February 3, 1999 memorandum to DEQ Director Dennis Treacy stated that "Higher ratios may be justified when wetlands of high functional quality are destroyed, when impacts occur within the Chesapeake Bay watershed, or when impacts are of substantial significance".

In terms of compensating for wetland impacts, on most projects the Corps uses their Branch Guidance, and we will probably agree with the compensation. The Corps Branch Guidance contains a range of mitigation ratios, but generally requires 2:1 compensatory mitigation for forested wetland impacts; 1.5:1 compensatory mitigation for scrub/shrub wetland impacts; and 1:1 compensatory

mitigation for emergent wetland impacts. According to the Corps guidance, compensatory mitigation is generally in the form of wetland creation or wetland restoration.

This guidance is presented to assist the staff in determining when it is appropriate to require higher ratios, in accordance with the above-stated directives. This guidance is for general applications and does not cover complex situations, such as when mixtures of wetland preservation and enhancement are combined with restoration or creation to form the total compensatory mitigation package. Case by case determinations will still need to be made, using the guidelines presented here as a framework. Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 with any questions about the application of this guidance.

For guidance purposes, it is acceptable to require higher compensatory mitigation ratios than the Corps in the situations listed below:

1) If the Corps does not require compensation for wetland impacts on a project that requires an individual permit.

In this unusual situation we recommend the compensatory mitigation be a minimum of 2:1 for forested impacts, 1.5:1 for scrub/shrub impacts, 1:1 for emergent impacts. This does not mean we will seek out small projects that fall below the notification thresholds, nor does it mean that we will issue permits for projects that receive Nationwide Permits on which DEQ has waived Section 401 Water Quality Certification.

2) When the impact is located in the Chesapeake Bay drainage and the proposed mitigation is outside the Chesapeake Bay drainage.

The Chesapeake Bay watershed is any area in Virginia located in a USGS Hydrologic Unit that begins with 02 (excepting 02080110 and 02060010, the Eastern Shore's Atlantic Ocean drainage). VWPP law prohibits the use or purchase of wetland mitigation bank credits outside of the Chesapeake Bay watershed to mitigate for Bay impacts. An exception to this law applies to linear transportation projects and locality projects for localities whose jurisdiction crosses river watersheds where the impact occurs in HUC Codes 02080108, 02080208 or 03010205. If there is no practical same basin mitigation alternative, the impacts are less than 1 acre, and there is not significant harm to water quality or fish and wildlife resources, mitigation can be provided in those watersheds provided it is in-kind and is as close as possible to the impact. Therefore off-site mitigation could legally occur outside the Bay drainage if not considered part of a wetland mitigation bank.

In order to encourage mitigation to remain within the Bay drainage whenever practicable, we recommend that compensatory mitigation could be as high as 10:1 for forested impacts, 7.5:1 for scrub/shrub impacts and 5:1 for emergent impacts. We have essentially multiplied the branch guidance ratios by a factor of five. The ratios serve as a disincentive to mitigating Bay impacts outside the Bay, which will help Virginia comply with the Chesapeake Executive Council Directive 97-2. If the applicant can demonstrate that no practicable within basin alternative exists, then branch guidance ratios should remain in effect.

3) When the Corps of Engineers accepts upland preservation as compensatory mitigation for wetland impacts without clear justification of water quality benefits.

Upland preservation may be appropriate in certain circumstances, in combination with other forms of mitigation: (1) if the upland buffer protects a unique habitat or high value resource or the water quality of created wetlands; or, (2) if the buffer is adjacent to Waters of the United States and is threatened by disturbance from grading, silvicultural or agricultural activities that would result in a decrease in water quality or integrity of adjacent wetland resources. At times, the Corps may give credit for compensatory mitigation by the preservation of uplands with no clear benefit to water quality. In these cases, DEQ may recommend additional compensation in the form of creation, restoration or preservation to offset the discount that the applicant has received, by virtue of the upland credit, from the traditional Branch Guidance ratios of 2:1, 1.5: 1 and 1:1 for forested, scrub/shrub and emergent wetland impacts, respectively. As an example, suppose the applicant has 1 acre of forested impacts. Normally this would require 2 acres of creation. Suppose the Corps has accepted as mitigation 1 acre of creation and a certain amount of upland preservation. The discount created by the upland preservation from the traditional 2:1 ratio is 1 acre. The DEQ could ask for another acre of creation or restoration to bring the mitigation package up to the traditional 2:1 ratio.

4) When the Corps compensatory mitigation package overly relies on wetland preservation.

At the appropriate ratios, wetland preservation is an acceptable form of mitigation. In theory, existing wetlands are protected and preservation is not needed, but with the Tulloch and Wilson cases we know that existing wetlands are not always fully protected and preservation has some ecological value. The recommended standard for including wetland preservation in the compensation package is that preservation should not produce a net loss of wetlands, nor should preservation be too highly valued compared to actual restoration or creation of wetlands. Our general standard for preservation in compensation packages is that 10 acres of preserved wetlands is equivalent to 1 acre of restored or created wetlands.

As an example suppose a permittee impacts 1 acre of forested wetlands. The traditional Corps Branch guidance recommends 2 acres of restoration or creation. The permittee offers 1 acre of restoration and 10 acres of preservation. This would be acceptable. The combination of 1 acre of restoration and 10 acres of preservation meets our general recommendation that preserved wetlands not receive the same amount of credit as created or restored wetlands. This also has the net result of creating and preserving the equivalent of 2 acres of wetland for the 1 acre impact. If the Corps mitigation package does not achieve no net loss, or if the preservation acreage is valued excessively, then permit managers should seek sufficient additional creation or restoration, or additional preservation, so that there is no net loss of wetland acreage.

5) When unique or high value wetlands are being impacted.

There are certain significant wetland types that would fit Secretary Woodley's instruction to seek higher mitigation ratios for wetlands of higher functional value and or when impacts are of substantial significance. Examples of such wetlands or impacts include: vernal pools; non-tidal wetlands with wetter hydrologic regimes, i.e. those designated C (seasonally flooded), E (seasonally flooded saturated) or F (semi-permanently flooded) on the Cowardin Scale; tidal wetlands that are seasonally flooded (designated R on the Cowardin Scale); wetlands within 5 miles upstream of a public water supply intake that provide a buffer to water supply quality (for reference the Health Department does not allow discharges within 5 miles upstream of an intake); wetland swamps with overstories dominated by Atlantic White Cedar, Bald Cypress or Water Tupelo; wetlands that include known habitat for threatened or endangered species; or wetlands adjacent to impaired waters where the impairment was caused or contributed to by the loss of wetlands (such that restoration of wetlands will result in water quality improvements).

The functions performed by these significant wetland types are often difficult or impossible to recreate. Therefore, in these cases we recommend that compensatory mitigation ratios be 3:1 for forested impacts; 2.25: 1 for scrub/shrub impacts; and 1.5:1 for emergent impacts (i.e., the Corps Branch Guidance ratios multiplied by a factor of 1.5).

6) When on-site mitigation is practicable and would provide ecological and water quality benefits but the applicant is mitigating off-site for convenience.

Practicable means capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes. In general on-site mitigation is often preferable to ensure minimal loss of on-site wetland functions, including habitat and water quality functions. If off-site wetland mitigation is indicated for lack of space, proper soils, or hydrology; or if cost and logistics are prohibitive; or if on-site mitigation provides no ecological or water quality benefits, then the traditional branch guidance ratios are acceptable. Otherwise, if the permittee wishes to go off-site for convenience, then a higher mitigation ratio may be indicated. This requirement is an incentive to keep the wetland functions, particularly the water quality functions, from being removed from the water body that is being directly impacted by the project. In these cases we recommend that compensatory mitigation ratios be 3:1 for forested impacts; 2.25:1 for scrub/shrub impacts; and 1.5:1 for emergent impacts (i.e., the Corps Branch Guidance ratios multiplied by a factor of 1.5).

7) When the permittee intends to use a wetland mitigation bank that relies heavily on preservation of wetlands and/or uplands over creation and restoration of wetlands.

DEQ supports the use of wetland mitigation banks when on-site mitigation is not practicable. However, at times the credit formulas used to establish the bank may not support the goals of compensatory mitigation with regard to the replacement for wetland losses for a particular project. Examples of this could be if the bank credit formula gives excessive credit for upland preservation

or wetland preservation over creation, restoration and enhancement. In general we recommend that 10 acres of preserved wetlands constitute 1 acre of wetland credit and that credit for upland preservation that provides a water quality benefit be at ratios from 15:1 to 20:1 depending upon the benefits derived.

The determination of how many credits to ask for in these cases would vary depending on the bank's credit formula and the percentage of bank credits derived from creation and restoration versus preservation.. The idea of an adjustment would be to bring mitigation up to traditional Branch Guidance ratios to achieve no net loss of wetlands by eliminating whatever credit had been gained from over-valuing preservation or crediting upland preservation in the credit formula.

8) When higher mitigation ratios are required by the State Water Control Board as a result of public hearing and case decision on a draft permit.

The SWCB will determine the appropriate ratio in these cases.

9) When additional mitigation is required to settle an enforcement action.

This is a case by case decision but in general at a minimum we would seek mitigation commensurate with the Branch Guidance ratios, i.e. 2 acres for an acre of forested impacts, 1.5 acres for an acre of scrub/shrub impacts and 1 acre for an acre of emergent impacts.

DISCLAIMER

This document provides procedural guidance to the permit staff. This document is guidance only. It does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the State Water Control Law and the implementation regulations on the basis of the site specific facts when permits are issued.

MEMORANDUM

DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

P. O. Box 10009 Richmond, VA 23240

SUBJECT: OWRM Guidance Memo No. 94 -011
Virginia Water Protection Permit Programs Public Notice Procedures

TO: Regional Directors, VWPP Staff

FROM: Larry G. Lawson, Director of Operations

DATE: October 5, 1994

COPIES: Robert Burnley, Martin Ferguson, Melanie Davenport

The purpose of this guidance memorandum is to establish consistent directions and formats for the Virginia Water Protection Permit programs public notice procedures.

Attached to this guidance memorandum are the procedures and formats to be used in the VWPP program when public noticing draft permits, denials, and hearings. These procedures and formats will become part of the new VWP Permit Manual when completed. Also attached to this memorandum is a disk with the formats for the letters and forms. These forms and letters are to be implemented effective the date of this memorandum.

PUBLIC NOTICE PROCEDURES

Public Notice of Draft Permit

The permit writer, upon completion of developing a draft permit, will draft a public notice for publication in a newspaper of general circulation in the area of the project. The permit writer will send the draft permit and public notice (see Attachment I and II) to the applicant for review and publication. Keep a copy of the draft permit and public notice (PN) that went to PN in the permit file. If a public hearing is required, see Hearing Procedures, Appendix III.

a. The owner is responsible for the payment of the public notice publishing cost. Refer to OECA any reissuance permits which have expired and are continuing to discharge.

Refer to the Transmittal Letter to the Applicant (Attachment I) and the Public Notice Verification Form (Attachment III).

b. The PN must be published once in a newspaper of general circulation in the county, city or town in which the discharge is located. Contact OPA for information concerning acceptable newspapers.

c. DEQ allows a period of **30 days** following the date of the public notice publication, during which time interested persons may submit their written comments (i.e. if the PN appears in Wednesday's newspaper, Thursday will be the first day of the 30-day comment period). Defer further processing actions until completion of public notice procedures.

If a decision is made to deny the permit based upon comments received, follow the Denial Procedures in Appendix III of this manual.

d. Attempt to resolve all comments which were received during the comment period in writing. Retain and consider all written comments submitted during the 30 days. At the end of the public notice period, send a written response to those individuals who commented during the public notice period. Specify in the response to comments which provisions, if any, have been changed and the reason for the change(s). This response should address all significant comments raised during the public notice period. For convenience, the same response letter may be sent to all who commented.

If any changes are made in the draft permit after the 30-day comment period, forward a copy of the revised pages of the draft permit to the VWPP Program Manager for concurrence.

If there are changes made to the draft permit as a result of public comment and all the changes fit into the definition of a minor modification, no additional advertising is required.

d. (cont.) If there are changes made that could not be characterized as a minor modification, another public notice of the draft permit may be required. If the changes were requested by the permittee, the permittee is responsible for paying for the cost of the second public notice, otherwise DEQ will pay for the second public notice.

e. All issuance, reissuance, modification, and denial files are to contain a copy of the actual public notices from the newspaper or a photocopy of the ad with a sworn statement from the newspaper. A photocopy without a sworn statement is **not** acceptable. The proof of publication is to be provided by the applicant to DEQ. The staff is to inform the applicant that permit processing will not proceed until the verification form is received.

ATTACHMENT I

Draft Permit/PN Transmittal Letter to Owner

Letterhead

DATE

Permittee Name
Permittee Address

Certified Mail
Return Receipt Requested

RE: **Issuance/Reissuance/Modification/Reissuance:** Permit Application #94-0000

Dear Permittee:

Enclosed is a copy of the proposed draft Virginia Water Protection Permit for the project referenced above. Acceptance of this permit's conditions is evidenced by the publishing of the attached public notice, which must appear in a newspaper of general circulation in the area of the project. The notice need only be published once and such publication will be at the applicant's expense.

Please review the attached public notice and draft permit package carefully. If you have any questions, comments, or objections concerning the draft permit or public notice, please contact this office within the next 14 days.

As part of the application processing, **we require proof of publication of public notice. Please have the publisher provide us with the actual copies of pages from the newspaper showing the notice and the date of the newspaper, or have them complete the attached sworn verification statement and forward it to this office.** Please note that it is DEQ's procedure to administratively deny all projects that are not public noticed within 45 days of receipt of this letter.

If you have any questions, please do not hesitate to contact me at (804) 527-**0000**, or at the above address.

Sincerely,

Permit Writer
(Title)
Office of Water Resources Management

Enclosures
cc: VWPP file
Consultant

ATTACHMENT II

Public Notice Format

PUBLIC NOTICE
ISSUANCE/REISSUANCE/MODIFICATION/DENIAL OF A VIRGINIA WATER PROTECTION PERMIT
AND
STATE CERTIFICATION UNDER THE STATE WATER CONTROL LAW

The Department of Environmental Quality (DEQ) has under consideration **(issuance/reissuance/modification/denial)** of the following Virginia Water Protection (VWP) Permit:

VWP Permit Number: 94-0000
Name of Permittee:
Project Name:
Project Location:
Permittee Address:
Stream: **Waterbody Name**
Basin:
Subbasin:
Section: Class:
Special Standards:

Description of VWP Permit Activities: (**Brief description of applicant's impacts to State waters and any mitigation**)

On the basis of staff review and application of lawful standards and regulations, the DEQ tentatively proposes to **(issue/reissue/modify/deny)** the VWP Permit subject to certain conditions.

Persons may comment in writing to the DEQ, Water Division on the proposed **issuance/reissuance/modification/denial** of the VWP Permit within 30 days from the date of the notice. Address comments to the contact person listed below. Comments shall include the name, address, and telephone number of the writer and shall contain a complete, concise statement of the factual basis for the comments. Only those comments received within this period will be considered. The DEQ may decide to hold a public hearing if it determines that public response is significant.

All pertinent information is on file and may be inspected, and arrangements made for copying by contacting **John Q. Writer** at: DEQ - Water Division, Office of Water Resources Management/VWPP, P.O. Box 11143, Richmond, Virginia 23230, or call **(000) 000-0000.**

Following the comment period, the DEQ will make a determination regarding the proposed **(issuance/reissuance/modification/denial).** This determination will become effective, unless the Director grants a public hearing. Due notice of any public hearing will be given.

ATTACHMENT III

Public Notice Verification Sheet

PUBLIC NOTICE VERIFICATION SHEET

PASTE PRINTED COPY OF NOTICE IN THIS SPACE

I hereby certify that the notice attached in the space above appeared

in the **(Insert Newspaper Name)** once on the following date:

_____ 19 ___

_____
(Signature)

_____
(Title)

_____ 19 ___
(Date)

Permit No. _____
Attn: **John Q. Writer**

Appendix III

PROCEDURES
FOR
INFORMAL PUBLIC HEARINGS - PERMIT ACTIONS

This section sets forth internal Water Division procedures for all informal permit public hearings. Its purpose is to identify specific legal requirements for hearings (see Appendix C), specific steps to be taken for authorizing and convening these hearings and acquiring Board action, and the responsibilities of various Agency units in the hearing process. In addition to the detailed procedures, there are several appendices which provide more guidance on certain steps in the hearing process, including Appendix A which provides a checklist that summarizes the steps of the process once a hearing has been authorized. These procedures are to be used by all Water Division units.

VPDES Permits; VPA Permits; VWPPs; Surface Water Permits; Ground Water Permits. Procedures do not apply to terminations.

1. Determining Need for Hearing on Applications for Permits

   a. VPDES Permits - VPA Permits - VWP Permits - Ground Water Permits

      1. Originating Unit (OU) causes notice of comment period on application to be issued to the public and in a newspaper of general circulation (once/week for two consecutive weeks) in the area in accordance with the State Water Control Law, federal law, or applicable regulations. For Ground Water Permits, OU sends notice of an application to each local governing body in the ground water management area and to each local governing body having the right to make substantial beneficial uses of ground water.
         (**NOTE:** 30-day comment period begins on date of first publication of the notice in the newspaper.)

      2. OU maintains list of those individuals, organizations, etc. that responded to the notice of the application.

      3. OU reviews all responses to the public notice and requests for public hearing in order to make a recommendation on the need for a public hearing. (**NOTE:** Final decision on holding a public hearing must be made by the Water Division Director within 30 days after the close of the public comment period above. In those cases where the owner has requested a hearing and there has been no notice of the comment period, the final decision on holding a public hearing should be made by the Water Division Director within 30 days after the request for public hearing was received.)

4. OU makes a determination as to whether the responses and requests meet the applicable provisions of Section II and III of Appendix C.

(a) If the responses and requests do not meet the provisions of Section II, but meet the provisions of Section III; the OU will proceed under Section 2. for authorization to deny holding a hearing.
(b) If the responses meet the applicable provisions of Section II, the OU will proceed under Section 2. for authorization to convene a hearing.

b. Denials of VPDES Permits - VPA Permits - VWP Permits - Ground Water Permits

1. OU makes a determination to recommend denial of a permit.

2. OU can proceed to public notice of the proposed denial of the permit or can proceed to seek authorization to do joint public comment and public hearing by proceeding with #2 below to final resolution.

2. Authorization to Deny or Convene a Hearing

a. The OU shall prepare an authorization memorandum to the Water Division Director which includes:
1. brief background
2. summary of responses and requests from public notices
3. summary of OU's attempts to address comments from the public
4. analysis of review of responses and requests as they apply to Section 1.a.4.
5. recommendation for denying or holding a hearing
6. rationale for recommendation
7. target date for Board action
8. copy of responses received (if there is a large number, send representative samples)

b. OU submits the following to the Water Division Director through the Office of Water Resources Management (OWRM) for VPDES Permits, VPA Permits, VWPPs and Surface Water Permits and through the Office of Spill Response and Remediation (OSRR) for Ground Water Permits:

1. authorization memorandum (described in 2.a.)
2. copy of public notice (if issued), the name of the newspaper the notice was published in, and the dates of publication
3. addressed envelopes for the owner and those individuals and organizations who responded to the public notice to notify persons of the hearing or a sample of the letter for the OU Director's signature to inform persons that a hearing has been denied

4. necessary permit/certificate/certification documents for Water Division Director signature if recommendation is to deny convening a hearing

c. Water Division Director approves recommendation and, (1) in the case of denial, signs the permit/certificate/ certification documents, returns package to OU and directs the OU to sign and mail the notification letters. (2) in the case of approval of convening a hearing, forwards the package to the Policy and Planning Supervisor, Office of Regulatory Services. (**Note:** Any letters prepared to notify persons that a hearing has been authorized should be for the OU Director's signature and mailed upon notification that the Water Division Director has authorized a hearing.)

(Note: Should Water Division Director disapprove recommendation, the package will be returned to the OU for appropriate action.)

d. Policy & Planning Supervisor, Office of Regulatory Services, notifies the OU, the Headquarters Unit (HU), and the Hearings Reporter of the Water Division Director's action by forwarding a copy of the signed approval/disapproval.

3. Arrangements for Hearing

a. Hearing Reporter and Policy & Planning Supervisor review the submission from the OU and determine legal requirements for notice of public hearing.

b. Hearing Reporter and Policy and Planning Supervisor complete checklist for hearing (see Appendix A).

c. Hearing Reporter arranges for a convenient date and location for the hearing allowing for compliance with all legal requirements.

d. Hearing Reporter contacts Board Chairman for assignment of Hearing Officer.

e. Hearing Reporter notifies Hearing Officer of assignment.

f. Hearing Reporter and OU establish date, 15 days after hearing, for close of hearing file.

g. Hearing Reporter prepares draft notice for review by Policy and Planning Supervisor and HU/OU.

h. Hearing Reporter finalizes notice.

i. Hearing Reporter is responsible for mailing the notice to interested parties, Board Members, and appropriate Agency staff including: copying the notice, acquiring necessary mailing labels from DIS, ensuring availability of sufficient postage, etc.

j. Hearing Reporter mails notice to all appropriate parties.

k. Hearing Reporter sends notice to newspaper for publication in accordance with notice requirements in Appendix C.

l. Hearing Reporter verifies newspaper receipt of notice for publication.

m. Hearing Reporter causes notice of hearing to be published in the Virginia Register.

n. Hearing Reporter prepares opening remarks for Hearing Officer.

o. OU prepares technical presentation for hearing.

p. OU prepares briefing memorandum for hearing officer.

(**NOTE:** Briefing memorandum can be an updated hearing authorization memorandum or the technical presentation if it is sufficient to inform the Hearing Officer of the background and the issues surrounding the permit action.)

q. OU submits briefing memorandum to Hearing Reporter with a copy to the HU 14 days prior to the hearing for review and approval.

r. OU submits technical presentation to HU for review and approval 7 days prior to the hearing.

s. OU submits to Hearing Reporter original (where possible) of file material for inclusion in the hearing file.

t. Hearing Reporter starts official file (exhibit list).

(**NOTE:** Material for the record should include, at a minimum, the draft permit, responses to the public notice, hearing authorization memorandum, hearing notice certifications, and all technical documents necessary to support the staff's anticipated recommendation to the Board.)

u. Hearing Reporter sends package to Hearing Officer (opening remarks, briefing memorandum, travel arrangements, map, etc.) 10 days prior to hearing.

v. OU Director or appropriate staff member may contact the hearing officer approximately 7 days before the hearing in order to set up a meeting prior to the hearing, if the hearing officer deems necessary.

4. Conduct of Hearing

a. Attendees include Office of Regulatory Services staff, technical support personnel from OU, and management representatives from the appropriate headquarters and regional office based on program or geographical areas of responsibility.

b. Hearing Reporter administers oath to speakers and tapes proceedings.

c. Hearing Reporter receives all written statements for inclusion in the hearing file.

d. Hearing Reporter closes file in accordance with date specified in notice.

e. Hearing Reporter provides, if requested by the OU, a copy of exhibits in record to the OU.

f. OU prepares a general summary of the hearing, in memorandum format, for presentation to the Board.

g. OU reviews technical issues and develops preliminary recommendations for concurrence by Headquarters Unit (HU) and Water Division Director for Board action.

5. Board Action

a. OU prepares proposed agenda item form, including proposed Board decision, and submits to the Office of Regulatory Services, in accordance with applicable Board meeting schedule.

b. OU prepares memorandum containing background, reference to the hearing and attaches summary of public comments, discussion of technical issues and recommendations (on separate sheet of paper) for Board action. (Note: Memorandum is to be reviewed and approved by HU.)

c. OU prepares and presents technical presentation and summary of the hearing to the Board.

d. OU presents recommendations.

e. OU prepares minute setting forth Board action.

f. OU prepares documentation to carry out Board action for Water Division Director signature (permit, transmittal letter, etc.).

g. OU transmits all necessary documents for Water Division Director through HU for signature after Board action.

h. OU or HU, upon receipt of signed documents, transmits documents to owner and other appropriate parties. (Note: For VPDES permits OU transmits the minors and OWRM transmits the majors.)

APPENDIX A - PART 1
HEARING CHECKLIST

ACTIVITY	RESPONSIBILITY	DUE DATE (IF APPLICABLE)
1. Prepare & submit authorization through Headquarters Unit (HU)	OU	
2. Acquire Water Division Director Approval	OU	
3. Notify Hearing Reporter	Policy & Planning Supervisor	
4. Contact Board Chairman for Hearing Officer Assignment and Inform Hearing Officer	Hearing Reporter	
5. Arrange Date, Time, & Location for Hearing	Hearing Reporter	
6. Draft Notice for Public & Newspaper	Hearing Reporter	
7. Review and Approve Notice	Policy & Planning Supervisor/HU/OU	
8. Develop Mailing & Newspaper Lists	Hearing Reporter	
9. Finalize & Distribute Notice to Newspapers, Virginia Register, SWCB Members, Office Directors, & Public/Owner/Petitioners	Hearing Reporter	
10. Verify Receipt of Notice by Newspapers	Hearing Reporter	
11. Prepare and Approve Opening Remarks for Hearing Officer	Hearing Reporter/ Policy & Planning Supervisor	
12. Prepare Technical Presentation	OU	
13. Prepare Briefing Memorandum	OU	
14. Review & Approve Technical Presentation	HU	
15. Establish Official File/Exhibit List (See #5 in Part 2 of Appendix A)	Hearing Reporter	

16. Send Package to Hearing Officer (See #6 in Part 2 of Appendix A)	Hearing Reporter	
17. Contact Hearing Officer to Schedule a Meeting Prior to the Hearing	OU	
18. Hold Hearing	Hearing Reporter/ Hearing Officer	
19. After Hearing, Complete File (Prepare Transcript, If Required)	Hearing Reporter	
20. Provide Copy of All Submissions by Public and Owner to OU	Hearing Reporter	
21. Prepare summary of Public Comments for Board	OU	
22. Prepare & Submit to Office of Regulatory Services a Proposed Agenda Item Form	OU	
23. Acquire Water Division Director's Approval of Agenda Item (Agenda Review)	Policy & Planning Supervisor/OU	
24. Submit Agenda Materials for Distribution to the Board	OU	
25. Prepare Technical Presentation for Board Meeting	OU	
26. Review and Approve Technical Presentation	HU	
27. Make Technical Presentation to the Board and Present Summary of Public Comments to the Board	OU	
28. Prepare Minute of Board Action and Other Documents Resulting From Board Action	OU	
29. Submit Minute to Office of Regulatory Services for Water Division Director Approval	OU	
30. Submit All Permit/Certificate Documents through HU for Water Division Director Approval	OU	
31. Acquire Water Division Director Approval and Forward Documents to OU	HU	
32. Transmit Documents to Owner & Other Appropriate Parties	OU/HU	

APPENDIX A - PART 2
SUBMITTAL CHECKLIST

SUBMITTAL ITEM & COMPONENTS	SUBMITTED
Denial Package (From OU) * memorandum * copy of responses to public notice * sample letter to responders from OU Director * permit/certificate package for Water Division Director signature	 _____ _____ _____ _____
Authorization Package (From OU) * memorandum * copy of public notice, and give the name of the newspapers which ran the public notice, and date of publication * list of individuals, organizations who responded to the public notice * addressed envelopes for the owner and those individuals and organizations who responded to the public notice	 _____ _____ _____ _____
Technical Presentation (From OU)	_____
Briefing Memorandum For Hearing Officer (From OU)	_____
Material for Hearing File (From OU and Hearing Reporter) * draft permit - fact sheet * responses to public notice * authorization memorandum * hearing notice * newspaper notice certifications * technical support documentation	 _____ _____ _____ _____ _____
Hearing Officer Package (Hearing Reporter) * briefing memorandum * opening remarks * travel arrangements	 _____ _____ _____

APPENDIX B.1 - NOTICE CONTENT FORMAT

The State Water Control Board will hold a public hearing to receive comments on the proposed (type of action) for (name of facility), (facility mailing address). The purpose of the hearing is to receive comments on the (proposed action).

(Name of facility) is a (type of operation) with (an existing or a proposed) discharge from its (type of discharge) to (receiving stream). The facility is located at (location of facility).

Public Notice No. (number) for the proposed (type of action) was published in the (name of papers) on (dates). Some individuals who responded to the public notice expressed concern over the (statement of concern).

The hearing will be held in the (location) on (date) at (time). This informal, fact-finding proceeding is being held pursuant to Section 9-6.14:11 of the Code of Virginia, (list section of State Water Control Law, Agency regulation and/or procedure).

Anyone wishing to speak at the hearing may do so, subject to any limitations imposed by the hearing officer. Anyone wishing to submit written comments for the record may do so at the hearing, or by mail so they are received by (give time and date for closing file), at which time the record will close. Written comments should include the name, address, and telephone number of the presenter and contain a complete, concise statement of the factual basis for the comments. The comments should be addressed to (give name of Hearing Reporter), Department of Environmental Quality, Office of Regulatory Services, Policy and Research Division, P. O. Box 10009, Richmond, VA 23240-0009.

More specific information on the proposed (type of action) including a fact sheet, draft permit and other documents, are available by contacting (give name of supervisor, grade 13 or above) at the Department of Environmental Quality's (give office name, location and phone number).

APPENDIX B.2 - NOTICE CONTENT EXAMPLE

The State Water Control Board will hold a public hearing to receive comments on the proposed issuance of a Virginia Pollutant Discharge Elimination System (VPDES) permit for Lake Charles on the James, Inc., William W. Johnson, President, 3951-C Stillman Parkway, Glen Allen, Virginia 23060. The purpose of the hearing is to receive comments on the proposed permit, the issuance or denial of the permit, and the effect of the discharge on water quality or beneficial uses of State waters.

The proposed facility would be located on the south side of State Route 5, approximately 1 mile east of Route 659 in Charles City County. Lake Charles on the James, Inc. is a proposed sewage treatment plant which would discharge municipal sewage to the James River.

Public Notice No. VA-PRO-M-0853 for the proposed permit was published in the Richmond Times Dispatch on April 16 and 23, 1988. Some individuals who responded to the public notice expressed concern over public health impacts, chlorine toxicity, the effectiveness of "package" plants, compliance monitoring, and water quality modeling.

The hearing will be held at 7:00 p.m. on Tuesday, August 30, 19898, in the Neighborhood Facility Building, County Courthouse Complex, Route 5, Charles City, Virginia. This informal, fact-finding proceeding is being held pursuant to Section 9-6.14:11 of the Code of Virginia, Section 3.6 of VR 680-14-01 (Permit Regulation), and the Board's Procedural Rule No. 1.

Anyone wishing to speak at the hearing may do so, subject to any limitations imposed by the hearing officer. Anyone wishing to submit written comments for the file may do so at the hearing, or by mail so they are received by 4:00 p.m. on Friday, September 9, 1988, at which time the file will close. Written comments should include the name, address and telephone number of the presenter and contain a complete, concise statement of the factual basis for the comments. The comments should be addressed to Doneva A. Dalton, State Water Control Board, Office of Policy Analysis, P.O. Box 11143, Richmond, Virginia 23230.

More specific information on the proposed permit including a fact sheet, draft permit and other documents are available by contacting J. R. Bell, Regulatory Services Supervisor, of the Board's Piedmont Regional Office, 2201 West Broad Street, Richmond, Virginia 23220, (804) 367-1006.

(*NOTE: THIS IS AN EXAMPLE. NEW ADDRESSES AND TITLES SHOULD BE USED.***)**

APPENDIX C
STATUTORY AND REGULATORY
CONSIDERATIONS FOR HEARINGS

I. Types of Hearings

A. Virginia Pollutant Discharge Elimination System (VPDES) Permit - Issuance, Modification, Revocation and Reissuance, or Termination
B. Virginia Pollution Abatement Permit (Industrial, Animal Wastes, etc.) - Issuance, Modification, Revocation and Reissuance, or Termination
C. VWPPs - Issuance, Modification, Denial, or Revocation
D. Groundwater Withdrawal Permits - Issuance, Modification, or Revocation

II. Factors to be Considered in Determining Need for Hearing Based on Responses to Public Notice of VPDES, VPA, VWPP and Ground Water Withdrawal Permit Actions

- That there is significant public interest in the action, and
- That there are substantial disputed issues relevant to the permit action, and
- That the issuance is not inconsistent with, or in violation of, the Water Control Law, federal law, or any regulation promulgated thereunder, or
- That a public hearing is required by statute.

III. Factors for Dispensing with Hearing

A. VPDES Permits - VPA Permits - VWPPs - Ground Water Permits All Actions [Section 1.14(a) of Procedural Rule No. 1]

- Where no person other than the applicant or permittee has requested a hearing, and
- Where no hearing is required by statute.

IV. Notice Requirements for Hearings

A. VPDES Permit Actions - All

1. State Water Control Law [Section 62.1-44.15(5)] 30 days notice of time, date, place and purpose to owner/applicant for amendment or revocation.
2. VR 680-14-01 [Section 3.7]
   - 30 days notice to be published at least once in a newspaper of general circulation in the county or city where the discharge is to occur.
   - 30 days notice to all persons and government agencies who received public notice of application.

- Content:
  Name and address of each owner whose application will be considered at the hearing.
  Description of the owner's activities or operations which result in the discharge.
  Name of receiving stream.
  Description of location and type of discharge to State waters.
  Reference to the public notice issued for the application, including the identification number and date of issuance unless the public notice and hearing notice are joint.
  Date, time and location of the hearing.
  Purpose of the hearing.
  Statement of the issues raised by the persons requested the hearing.
  Address of Agency office at which additional information on the application can be obtained.
  Reference to the procedures to be followed at the hearing.

3. Procedural Rule No. 1 [Section 1.12(d)]

- Not less than 30 or more than 60 days notice of the time, date and place of the hearing.
- Notice to be given to each requester and the applicant or permittee.
- Content:
  Same as VR 680-14-01 (Section 3.7).

B. VPA Permit Actions - All

1. State Water Control Law [Section 62.1-44.15(5)]
   - 30 days notice of time, date and place of owner/application for amendment or revocation.
2. VR 680-14-01 [Section 3.7]
   - 30 days notice to be published at least once in a newspaper of general circulation in the county or city where the discharge is to occur.
   - 30 days notice to all persons and government agencies who received public notice of application.
   - Content:
     Name and address of each owner whose application will be considered at the hearing.
     Description of the owner's activities or operations which result in the discharge.
     Name of receiving stream.
     Description of location and type of discharge to State waters.
     Reference to the public notice issued for the application, including the identification number and date of issuance unless the public notice and hearing notice are joint.
     Date, time and location of the hearing.
     Purpose of the hearing.
     Statement of the issues raised by the persons requested the hearing.
     Adddress of Agency office at which additional

information on the application can be obtained.
Reference to the procedures to be followed at the hearing.

3. Procedural Rule No. 1 [Section 1.12(d)]

- Not less than 30 or more than 60 days notice of the time, date and place of the hearing.
- Notice to be given to each requester and the applicant or permittee.
- Content:
  Same as VR 680-14-01 (Section 3.7).

C. VWPPs Actions - All

1. State Water Control Law [Section 62.1-44.15(5)

- 30 days notice of time, date and place to owner/applicant for amendment or revocation.

2. VR 680-15-02 [Section 3.3 & 3.4]

- 30 days notice to be published at least once in a newspaper of general circulation in the county or city where the discharge is to occur.
- 30 days notice to all persons and government agencies who received public notice of application.
- Content:
  Name and address of each owner whose application will be considered at the hearing.
  Description of the owner's activities or operations which result in the discharge.
  Name of receiving stream.
  Description of location and type of discharge to State waters.
  Reference to the public notice issued for the application, including the identification number and date of issuance unless the public notice and hearing notice are joint.
  Date, time and location of the hearing.
  Purpose of the hearing.
  Statement of the issues raised by the persons requested the hearing.
  Address of Agency office at which additional information on the application can be obtained.
  Reference to the procedures to be followed at the hearing.

3. Procedural Rule No. 1 [Section 1.12(d)]

- 30 days notice of time, date, place and purpose to be published once in a newspaper of general circulation in the city or county where activity/operation is located.
- 30 days notice of time, date and place to owner.
- 30 days to all individuals that requested hearing.

D. Groundwater Withdrawal Permits Actions - All

1. State Water Control Law [Section 62.1-44.15(5)]

- 30 days notice of time, date and place to applicant for amendment or revocation.

2. VR 680-13-07 [Section 5.4]

- 30 days notice to be published at least once in a newspaper of general circulation in the area affected by the proposed withdrawal.
- 30 days notice to all persons and government agencies which received public notice application.
- Content:
  Name and address of each person whose application will be considered at the hearing, the amount of ground water withdrawal requested expressed as an average gallonage per day, and a brief description of the beneficial use that will be supported by the proposed ground water withdrawal.
  Precise location of the proposed withdrawal and the aquifers that will support the withdrawal.
  Reference to the public notice issued for the permit or special exception application, including identification number and date of issuance unless the public notice includes the informal hearing notice.
  Date, time, and location of the hearing.
  Purpose of hearing.
  Statement of issues raised by the persons requesting the hearing.
  Name and address of agency contact where additional information can be obtained.
  Reference to the rules and procedures to be followed at the hearing.

3. Procedural Rule No. 1 [Section 1.12(d)]

- Not less than 30 or more than 60 days notice of the time, date and place of the hearing.
- Notice to be given to each requested and the applicant or permittee.

V. Requirements for Holding File Open

All Permits - 15 days after public hearing

APPENDIX B.3- NOTICE OF CONTENT FORMAT
Ground Water Withdrawal Permits

The State Water Control Board will hold a public hearing to receive comments on the proposed ground water permit application for (name of facility), (facility mailing address). The purpose of the hearing is to receive comments on the proposed (amount of withdrawal requested) gallon per day withdrawal.

(Name of facility) is a (type of operation) with (an existing or a proposed) withdrawal from the (aquifer name(s)). The withdrawal facility is located at (location of facility with route numbers, road intersections, map locations or similar information). The withdrawal will be applied to the following beneficial use: (describe intended beneficial use).

Public Notice No. (number) for the proposed (type of action) was published in the (name of papers) on (date). Some individuals who responded to the public notice expressed concern over the (briefly describe the statement of concern).

The hearing will be held in the (location) on (date) at (time). This informal, fact-finding proceeding is being held pursuant to Section 9-6.14:11 of the Code of Virginia, (list section of State Water Control Law, Agency regulation and/or procedure).

Anyone wishing to speak at the hearing may do so, subject to any limitations imposed by the hearing officer. Anyone wishing to submit written comments for the record may do so at the hearing, or by mail so they are received by (give time and date for closing record), at which time the record will close. Written comments should include name, address, and telephone number of the presenter and contain a complete, concise statement of the factual basis for the comments. The comments should be addressed to (give name of Hearing Reporter), Department of Environmental Quality, Office of Regulatory Services, Policy and Research Division, P. O. Box 10009, Richmond, Virginia 23240-0009.

More specific information on the proposed (type of action) including a fact sheet, draft permit and other documents, are available by contacting (permit writer name) at the Department of Environmental Quality's (give office name, location, and phone number.)

MEMORANDUM

DEPARTMENT OF ENVIRONMENTAL QUALITY - WATER DIVISION

P. O. Box 10009 Richmond, VA 23240

SUBJECT: OWRM GUIDANCE MEMORANDUM NUMBER 94-010
1. Review of Environmental Impact Documents, and 2. Permitting Department of Transportation Projects

TO: Regional Directors, Virginia Water Protection Permit Staff

FROM: Larry G. Lawson, Director - OWRM

DATE: October 5, 1994

COPIES: B. Burnley, M. Ferguson, R. Gregory, F. Cunningham, C. Bigelow

This memorandum is designed to provide guidance to the staff regarding the review of environmental impact assessments and statements as well as the permitting of Department of Transportation (VDOT) projects. Part one of the memorandum covers the appropriate scope of review and comments for environmental documents. Part two addresses the specific case of certain minor road crossing projects for the VDOT.

1. Review of Environmental Impact Documents:

In the review of environmental impact documents the staff must focus its review and comment toward areas within the DEQ's jurisdiction over water quality. Generally, the focus of the DEQ staff review of Environmental Impact Assessments/Statements should be confined to the sections of the documents concerning alternatives, existing natural resources, impact of alternatives, conclusions, as well as supporting technical studies and reports. These portions of the environmental documents focus on those areas which would result in impacts to surface waters, including wetlands. Areas of environmental documents focusing on socioeconomic impacts, purpose and need, and supporting analytical technical reports are generally not appropriate areas of focus for staff comment. When reviewing environmental impact documents for projects sponsored by, or on behalf of the Commonwealth of Virginia, staff should recognize that comment on the purpose and need section of the document should be unnecessary. DEQ staff responsibilities in the area of environmental review and permitting are to ensure that state projects proceed in an environmental sensitive fashion by providing their technical expertise in guiding the development of the alternatives to be considered for State projects.

The scope of staff review should be confined to the effects of the proposed activities on water quality standards, beneficial uses of state waters and State Water Control Law. For guidance on the use of

water quality standards in surface water and wetland protection staff are referred to the publication WETLANDS AND 401 CERTIFICATION: Opportunities for States and Eligible Indian Tribes, United States Environmental Protection Agency, April, 1989, the Virginia Water Quality Standards, VR 680-21-00, and The §404(b)(1) Guidelines for Specification of Disposal Sites for Dredged and Fill Material, 40 CFR Parts 230 through 233.

Definitions of the terms surface waters, wetlands, and beneficial uses are found in the Virginia Water Protection Permit Regulation, VR 680-15-02.

2. Permitting of Department of Transportation Projects:

VDOT is required to adhere to all environmental laws and regulations when undertaking projects on behalf of the Commonwealth. However, the review and permitting of projects proposed for permitting by VDOT is accomplished through a special coordinating process which presents unique opportunities for streamlining permitting. This presents a unique opportunity for the staff to exercise greater flexibility in permitting decisions affecting minor VDOT projects.

One area where we can exercise additional flexibility in permitting of transportation projects is for projects which do not meet the DEQ's conditions on Nationwide Permits No.'s 14 and 26 due to minor excursions from the conditions. Specific examples where flexibility is appropriate include cases where it has been shown that:

a) Box and pipe culverts cannot be countersunk due to presence of bedrock or attachment to non-countersunk culverts.

b) Questionable benefits will be obtained by countersinking culverts which contain sufficient water to allow fish passage during normal flow conditions.

c) Permitting the relocation of perennial roadside ditches will not result in any significant increase in water quality or beneficial uses.

d) Road crossings require up to 120 linear feet of channel modification in order to accommodate new road standards. The current 60 linear foot limitation on Nationwide Permit No. 26 forces an individual permit on most VDOT road crossings not qualifying for Nationwide Permit No. 14.

These examples represent the minor increases for road impacts associated with VDOT projects as compared to the other more extensive projects they must undertake on behalf of the Commonwealth. Additionally, VDOT at the monthly coordination meeting must incorporate DEQ requirements for avoidance and minimization of impacts into its project plans, or provide an explanation and alternative approach in cases where it cannot avoid impacts to surface waters and wetlands. As

this process provides for a larger degree of control over state transportation impacts than with private sector projects staff should strongly consider waiver of these minor impact projects under the following conditions:

a) When VDOT has demonstrated that countersinking is not feasible due to the presence of bedrock. VDOT should however consider the use of pipe arches, bottomless box culverts, or bridge arch type structures, which do not encroach on stream bottoms, wherever practicable. VDOT has agreed to look into the possibility of procuring these types of structures and will be engaged in further discussions on this subject with us.

b) When the flow in the box culvert is, under normal conditions, sufficient to allow for the passage of indigenous fish species, or is 12 inches in depth, whichever is greater. Staff may, at their discretion, lower this depth if 12 inches is not required to pass indigenous fish populations. It is suggested that staff consider that depths less than six inches, unless natural, are inappropriate.

c) Staff should be considering waiver for relocation of perennial roadside ditches unless there is an unusual circumstance that would justify the need for an individual permit.

d) Staff should acknowledge that the new standard for secondary road crossings is 120 linear feet in width. With appropriate justification, and provided that the necessary environmental controls will be utilized, staff should consider waiver of permit requirements for these routine projects. Examples of projects that would require full justification and environmental controls in order to be waived are box & pipe culverts which encroach on the stream bottom, as well as replacing existing bridges with structures that increase the impacts to the stream. In all cases VDOT should have examined alternative, less impacting structures, such as those noted in a) above, and provide justification as to why a less impacting structure is not utilized.

This guidance to staff will remain in place unless changed in writing, or until such time that appropriate changes are undertaken in DEQ conditions for Nationwide Permits 14 and 26 through the APA process. Should you have any questions please contact Headquarters.

M E M O R A N D U M

VIRGINIA WATER CONTROL BOARD

OFFICE OF WATER RESOURCES MANAGEMENT

SUBJECT: **OWRM Guidance Memo No. 93 - 002**
Guidance on Waiver of Virginia Water Protection Permits

TO: **OWRM VWP Staff**

FROM: **Larry G. Lawson, P. E.**
Director, Office of Water Resources Management

DATE: **February 8, 1993**

COPIES: **Bob Burnley, Regional Directors, Dave Paylor, Martin Ferguson, Ron Gregory, Chet Bigelow, Joe Hassell**

The purpose of this memorandum is to provide guidance on the waiver of Virginia Water Protection (VWP) permits pursuant to Section 4.5 of VR 680-15-02 (Virginia Water Protection Permit Regulation).

Section 1.5. A. Prohibitions and requirements for Permits of VR 680-15-02 states that:

> "No person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, except as authorized pursuant to a Virginia Water Protection Permit,....."

Section 4.5 Waiver of a permit provides that:

"A. In applications where the State Water Control Board determines that a proposed activity or activities will have minimal or no environmental consequence, a waiver of the requirement for a permit may be granted.

B. The Applicant and the Corps of Engineers will be notified of this decision. Waiver of the requirement for a permit will be considered when:

1. The impact of the proposed activity is of minimal environmental consequence;

2. The impacts of the proposed activity are temporary in nature and recovery of the beneficial use of the area is assured; and

3. The impacts of the proposed activity will be fully and successfully mitigated by the applicant such that additional conditions imposed by the Board are unnecessary."

Thus, even though Section 1.5 states that no person shall dredge, fill or discharge.....except as authorized pursuant to a VWP permit, Section 4.5 provides that the Board may grant a waiver to the requirement for a VWP permit. Therefore, the purpose of this memorandum is to provide guidance on activities that may be waived from the requirement to have a VWP permit.

In considering the activities for which a VWP permit may be waived the staff must consider the other agencies and potential applicants involved in this program area and establish permit waivers consistent with their programs. One of these agencies, the Corps of Engineers, has issued Clean Water Act Section 404 Nationwide and Regional Permits for activities for which a VWP permit waiver may be appropriate. Thus, the Corps permits and the terminology used therein will be utilized in providing the guidance on the VWP permits that the Board may waive. One of the Corps Regional Permits RP-19 is especially appropriate and is the primary basis for the waiver guidance included herein.

Therefore, pursuant to Section 4.5 of VR 680-15-02 it is recommended that the staff consider waiving the requirement for a VWP permit for the installation or construction of:

1. Submarine utility lines and associated dredging or excavation. Waiver is appropriate when the work is accomplished in such a fashion that no uncured concrete is discharged directly into state waters (e.g. use of temporary cofferdams) and appropriate silt and erosion control measures are employed.

2. Groins and spurs or baffles constructed along with and connected to groins.

3. Bulkheads, riprap and associated backfill. Waiver is appropriate in all cases where clean backfill material is used.

4. Bulkhead repair and/or replacement up to two feet channelward of an existing, deteriorated bulkhead. Waiver is appropriate in all cases where clean backfill material is used.

5. Boat ramps and accessory structures, including any fill or excavation necessary for installation. Waiver is appropriate when the work is accomplished in such a fashion that no uncured concrete is discharged directly into state waters (e.g. use of temporary cofferdams) and appropriate silt and erosion control measures are employed.

6. Submerged sills.

7. Low breakwaters.

8. Recreational boat houses which are part of a private dock or pier, and/or additions to existing piers and docks. Generally this will mean all boat houses.

9. Temporary cofferdams for utility line construction and boat ramps.

10. Crab pounds.

11. Mooring piles/dolphins, fender piles and camels.

In addition to the above activities, the staff may consider the waiver of the requirement to obtain a VWP permit on a case-by-case basis provided the activity is consistent with the provisions of Section 4.5. B. When forwarding a recommendation for waiver the staff should provide their rationale for the waiver in the transmittal memorandum.

Attached is a suggested letter that may be used in issuing the waiver requirement to obtain a VWP permit.

WAIVER LETTER FOR VWP PERMIT

APPLICANT Name and Address

RE: Application No. _____

Dear _____ :

We have received and reviewed your application dated _____ for a Virginia Water Protection (VWP) Permit.

Based on our review of your application, we have determined that the proposed activity will have minimal impact on the quality of state waters. Therefore, pursuant to Section 4.5 of the Virginia Water Protection Regulation the State Water Control Board waives the requirement for you to obtain a VWP Permit. In accordance with this action the requirement for a Water Quality Certification under Section 401 of the Clean Water Act is also waived. Unless your proposed activity undergoes significant change, modification, or addition, no further communication regarding the VWP permit is required with this agency.

This waiver does not relieve you from the responsibility of conducting the proposed activity in a manner to meet all the laws and regulations, including the water quality standards, as may be applicable.

You are advised that the activity you propose may require permits from the Virginia Marine Resources Commission and the U. S. Army Corps of Engineers. If you have any questions regarding the status of your application with those agencies, I suggest you contact them directly.

If you have any questions on this waiver for the VWP Permit please feel free to contact _____ at _____.

Sincerely,

Executive Director

cc: Army Corps of Engineers, Norfolk District
Virginia Marine Resources Commission

2

M E M O R A N D U M

VIRGINIA WATER CONTROL BOARD

OFFICE OF WATER RESOURCES MANAGEMENT

SUBJECT: OWRM PROGRAM GUIDANCE MEMORANDUM NO. 91-004
Permits/Certificates Approved at Board Meetings

TO: Regional Directors

FROM: Larry G. Lawson, Director-OWRM

DATE: February 1, 1991

COPIES: Bill Woodfin, Martin Ferguson, Fred Cunningham, Ron Gregory, Regional Office Water Resources Managers, Regional Office Water Resources Development

As you know the Executive Director has been authorized to issue the majority of the permits that are issued by the Board. However, there are some permits that must be acted on by the Board Members at a Board meeting. These include permits that have been the subject of a public hearing as well as all ground water permits and certificates. Following the Board action on a permit at a Board meeting the staff has then returned to the office and prepared an appropriate permit for issuance. Unfortunately in some instances it has taken long periods of time for the staff to actually issue the permit that was approved by the Board Members. Thus, the purpose of this memorandum is to establish a procedure for issuance of permits approved by the Board Members at a Board meeting.

Beginning with the March 1991 Board meeting, the Regional Office/Headquarters Office staff member that is responsible for a permit/certificate presentation at the Board meeting shall prepare and bring with them to the Board meeting the final permit package proposed for issuance. This will require that all pre-signature procedures and concurrences will have been accomplished prior to the Board meeting. If the Board Members approve the permit as proposed then the staff member shall give the final permit package to OWRM for issuance. If the Board Members approve a modification of the permit that the staff member has prepared then the staff member responsible for the Board presentation is responsible for immediately (the same day) preparing a revised final permit. Upon preparation of the final revised permit, the permit package shall be given to OWRM for processing.

If the Regional Office is responsible for the permit then it must be prepared for final issuance before the staff member returns to the Regional Office.

I recommend that the Regional Office responsible for permit presentations to the Board bring along with them the final permit package and a computer disc which contains the final permit. Thus, if the Board approves a modified permit from the version that the staff member has prepared then the permit on the disc can be immediately revised to reflect the Board action.

I recognize that this procedure may be inconvenient for you and your staff, especially for the March Board meeting. However, hopefully by the June Board meeting we will be in our new office and the proximity of the meeting room to the necessary word processing equipment should help soften the effect on you.

If you have any questions on this procedure please contact either Martin Ferguson or myself.